

Canada Industrial Relations Board



Conseil canadien des relations industrielles

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Reasons for decision

International Longshore and Warehouse Union,
Local 500,

applicant,

and

Certispec Services Inc.,

employer.

Board File: 28395-C

Neutral Citation: 2012 CIRB 643

June 14, 2012

The Board was composed of Mr. William G. McMurray, Vice-Chairperson, and Messrs. John Bowman and André Lecavalier, Members. Case management teleconferences were held January 4 and 5, 2011, and May 18, 2011. Hearings were held on May 25 to 27, 2011 and August 9, 2011, in Vancouver.

Appearances

Ms. Marjorie Brown, Counsel for the International Longshore and Warehouse Union, Local 500;
Mr. Michael A. Watt, Counsel for Certispec Services Inc.

These reasons for decision were written by Mr. William G. McMurray, Vice-Chairperson.

I-Introduction

[1] On September 24, 2010, the International Longshore and Warehouse Union, Local 500 (the union) applied to the Board, pursuant to section 24(1) of the *Canada Labour Code* (Part I-Industrial Relations) (the Code), to be certified as the exclusive bargaining agent for a group of marine surveyors employed by Certispec Services Inc. (Certispec or the employer) working out of its offices in British Columbia. In its application, the union indicated that the proposed bargaining unit would be composed of three employees. The union subsequently indicated that the three marine surveyors at issue were those working in the Marine Technical Services Group (MTSG) at Certispec.

[2] On October 12, 2010, the employer filed its response to the application. The employer opposed the union's certification application on the grounds, primarily, that the employer is not a federal work or undertaking and that its labour relations do not, therefore, come within federal jurisdiction. Certispec says it has 17 full time and 20 casual employees performing the various services it offers. At the hearing, it said it employs more than 60 people in all, in various capacities. The employer says that its company offers independent marine surveying, inspection, sampling and laboratory testing services. It argues that it does not load and unload ships, and that its services relate predominantly to the inspection of goods and commodities bound for export. It says these services are related to the commercial transactions involving the goods themselves and are not predominantly related to shipping. Although the three marine surveyors within the scope of the union's proposed certification perform their services on or around ships, the employer says that its operations have very little to do with shipping in the constitutional sense. The employer says the work of the 3 marine surveyors cannot be severed from the work of the 60 other people it employs.

[3] In the alternative, if its labour relations are within federal jurisdiction, the employer challenges the scope and the appropriateness of the proposed bargaining unit. The employer argues that one of these proposed members performs management functions and is not, therefore, able to be included in the proposed bargaining unit on the basis that he is not an employee within the definition of that word at section 3 of the Code. The employer says that another one of the three members should be excluded from the scope of the proposed bargaining unit because he lacks a sufficient and continuous interest in the employment relationship; his resignation from the company was imminent at the time

the certification application was made to the Board. The employer also argues that the proposed bargaining unit is inappropriate; that two employees is too few members to constitute a unit viable for collective bargaining.

[4] On October 18, 2010, the union filed its reply. On the constitutional issue, it submits that the work of the three marine surveyors falls within federal jurisdiction as their work is integral to the federal undertaking of shipping. Moreover, the work of the remaining Certispec employees is not necessary, essential or integral to the remainder of the employer's operation and is, therefore, a divisible part of the employer's operations in the constitutional sense.

[5] The union rejects the employer's challenges to the proposed bargaining unit. The union says that all three marine surveyors are "employees" within the statutory definition of the word and that all had a sufficient and continuing interest in the employment relationship at the time the application was made to the Board. The union says that the proposed bargaining unit is viable and, therefore, appropriate under the *Code*. On January 7, 2011, the union issued a Notice of Constitutional Question. The union framed the constitutional question as: "whether any ruling by the CIRB that the bargaining unit applied for by Local 500 is too small to be viable violates s. 2(d) of the *Charter*" being Part I of the *Constitution Act, 1982*.

[6] Both parties requested the Board to hold a hearing into the certification application. The Board scheduled a hearing to begin on January 18, 2011. Following a number of different adjournment requests, the hearing proceeded on May 25, 26 and 27, and August 9, 2011, in Vancouver, British Columbia.

[7] In the course of the hearing, the Board heard *viva voce* evidence from witnesses who work or have worked as marine surveyors, for Certispec or for other employers in the course of their careers. The Board therefore received a thorough education into the work, duties and functions of the three marine surveyors who are the subject of the union's proposed bargaining unit. The Board now has a good understanding of what it is those marine surveyors do on a day-to-day basis.

[8] The critical threshold issue in this case, and the primary reason why the Board decided to hold a hearing, is the jurisdictional question. Under the federal-provincial division of powers in the *Constitution Act, 1867*, labour relations are recognized to be a matter within the jurisdiction of the provinces. Federal jurisdiction over labour relations is the exception. Pursuant to section 4 of the *Code*, the Board only has jurisdiction over labour relations involving employees who are employed on or in connection with the operation of any federal work, undertaking or business. Section 2 of the *Code* defines a federal work, undertaking or business to include works within the legislation authority of Parliament as well as:

2.(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada.

The union did not argue with any vigor that Certispec, itself, is a federal work, undertaking or business.

[9] The question of whether marine surveyors are employed on or in connection with the operation of a federal work appears to be essentially a matter of first instance.

[10] On the one hand, it is clear that both this Board and its predecessor have assumed and exercised jurisdiction over marine surveyors from time to time. Both this Board and its predecessor have issued orders certifying a bargaining unit composed of marine surveyors. Similarly, both Boards have issued orders revoking some certifications. At the time the union filed its certification application now before us, at least one such certification order was still in effect: in 1989 the Canada Labour Relations Board (CLRB) certified the International Longshore and Warehouse Union, Local 518 (ILWU Local 518) as the bargaining agent for a unit composed of "all employees of SGS Supervision Services Inc. employed as marine surveyor" (CLRB order no. 5487-U dated December 20, 1989).

[11] On the other hand, it appears ours is the first hearing held to consider, among other things, the jurisdictional question. Neither this Board nor its predecessor have ever previously had the benefit of the type of evidence that this panel of the Board heard in Vancouver, British Columbia, involving the details of the work that marine surveyors actually perform. Reference must be had, therefore, to

two decisions involving, either directly or indirectly, the work of marine surveyors or their employers: the 1992 CLRB decision involving SGS Supervision Services Inc. (SGS) and the 2001 Canada Industrial Relations Board (CIRB) decision involving IMS Marine Surveyors Ltd. (IMS).

[12] In 1991, the same ILWU Local 518 returned to the CLRB asking to be certified for a more comprehensive bargaining unit of employees of the same employer, SGS. The union did not seek to include the marine surveyors employed by SGS in that new unit. In 1992, following three days of hearing, the CLRB issued a decision finding that the overall operations of SGS did not fall within federal jurisdiction:

Taking all of the foregoing into consideration in light of the requirements of the *Northern Telecom* tests, it is difficult to see how the operations of SGS can be found to be vital, essential or integral to any core federal undertaking involved in shipping and navigation.

(*SGS Supervision Services Inc.* (1992), 87 di 127 (CLRB no. 923; page 137) (*SGS Supervision Services*); emphasis in original.)

Although the CLRB held a hearing in that case, the scope of the proposed bargaining unit at issue was such that the Board did not have to focus on the duties and functions of marine surveyors. In the penultimate paragraph of that decision, the CLRB did, however, allude to a jurisdictional question in the context of marine surveyors:

Should the circumstances today no longer warrant a separate bargaining unit for the marine surveying functions of SGS or, if it is now clear that these functions are indeed provincial, the parties can come back to the Board if they are unable to mutually decide how to deal with the situation.

(page 138)

[13] In 1999, the ILWU Local 518 applied to be certified as bargaining agent for a unit of marine surveyors employed by IMS. The employer opposed the certification, but evidently did not question the Board's jurisdiction over marine surveyors. This Board ordered a representation vote to determine the level of support for the certification application. The Board made its decision without a hearing. In that case, the Board was not, therefore, required to direct its mind to the constitutional division of powers (*IMS Marine Surveyors Ltd.*, 2001 CIRB 135).

[14] It is for those reasons that the Board says that this is essentially a matter of first instance.

II—Issues

[15] At the conclusion of the hearing, the following issues remained to be determined by the Board:

1—Whether the marine surveyors within the proposed bargaining unit are employed on a work, undertaking or business operated or carried on for or in connection with navigation and shipping; and

2—If so, whether the work of the marine surveyors within the proposed bargaining unit is divisible or severable from the remainder of the work performed by Certispec's other employees.

[16] If the Board finds that it does have jurisdiction over the labour relations of the subject marine surveyors, then the Board must determine the employer's challenges as to the scope and the appropriateness of the bargaining unit. These issues include:

3—Whether Captain A. R. is "a person who performs management functions" within the definition of employee at section 3 of the *Code*;

4—Whether Mr. M. H. P., who is an employee, has a sufficient and continuing interest in the employment relationship, and by extension, in the proposed bargaining unit; and

5—Whether the proposed bargaining unit is viable.

III–Determinations

[17] Having considered all of the submissions on file and all of the evidence and arguments at the hearing, the Board finds and determines:

1–That the work performed by the three marine surveyors that are the subject of the union’s certification application is not work that is vital, integral or essential to the operation of navigation and shipping;

2–That the three marine surveyors at issue are not, therefore, employed on or in connection with the operation of any federal work, undertaking, or business;

3–That the Board has no jurisdiction under the *Code* to proceed to determine the union’s application for certification;

4–That the Board has no jurisdiction under the *Code* to determine the various challenges to the scope or to the appropriateness of the proposed bargaining unit; and

5–That the constitutional question raised by the union is moot.

[18] In the circumstances, the Board is compelled to dismiss the union’s application for certification for lack of jurisdiction. The Board communicated these determinations to the parties in *Certispec Services Inc.*, 2011 CIRB LD 2699, dated December 22, 2011. The reasons for these determinations are set out in the balance of this decision.

IV–Survey of the Relevant Law

[19] A survey of the law applicable to a case such as this invariably begins with the observation that, since 1925, labour relations in Canada have been primarily a matter of provincial jurisdiction and competence.

A-Relevant Statutory Law

[20] The statutory provisions relevant to the threshold constitutional determination that the Board must make in this application for certification are found at sections 2 and 4 of the *Code* and sections 91.10, 91.29 and 92.10(a) of the *Constitution Act, 1867* (formerly the *British North America Act, 1867*).

[21] As stated by Mr. Justice Dickson in *Northern Telecom Limited v. Communications Workers of Canada et al.*, [1980] 1 S.C.R. 115 (*Northern Telecom*, 1980):

“The importance of ss. 108 [currently section 4] and 2 of the *Canada Labour Code* read in conjunction with ss. 91 and 92 of the [*Constitution Act, 1867*] is the recognition of the essentially constitutional nature of the problem of jurisdiction raised in this case.”

[sic]

(page 129)

1-The Canada Labour Code

[22] Sections 2(a) and 4 of the *Code* set out the scope of the Board’s jurisdiction for the purposes of this certification application. Both sections expressly refer to employees employed “on [for] or in connection with” the operation of a federal work or undertaking.

[23] Section 4 of the *Code* specifies that *Part I* of the *Code* applies in respect of employees who are employed on or in connection with the operation of any federal work or undertaking:

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers’ organizations composed of those employees or employers.

[24] Section 2 of the *Code* defines federal work, undertaking or business and refers, at section 2(a) to the operation of a work carried on for or in connection with navigation and shipping:

2. In this Act,

“federal work, undertaking or business” means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada.

2—The Constitution Act, 1867

[25] Sections 2 and 4 of the *Code* are based on or derived from the language used at sections 91.10 and 92.10(a) of the *Constitution Act, 1867*. Federal legislative jurisdiction over “navigation and shipping” is found at section 91.10.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —

...

10. Navigation and Shipping.

Federal jurisdiction over interprovincial and international transportation of goods by sea is found at section 92.10(a) when read in conjunction with section 91.29.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —

...

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province: ...

Section 91 sets out the scope of federal legislative jurisdiction, including:

91.29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

B—Key Jurisprudence

1—Courts

a—Federal Jurisdiction is the Exception

[26] Federal jurisdiction over labour relations does exist, but it is the exception, not the rule.

[27] In 1925, the Judicial Committee of the Privy Council determined that labour relations are a matter of “property and civil rights in the province,” one of the matters enumerated at section 92 of the *Constitution Act, 1867* as falling within the exclusive legislative power of the provinces. Labour relations “were concerned directly with the civil rights of both employers and employed in the province.” In so doing, it rejected the view that federal jurisdiction over labour relations throughout all of Canada could be found under one of the matters enumerated at section 92 of the *Constitution Act, 1867*, such as the regulation of trade and commerce or the peace, order and good government of Canada (see *Toronto Electric Commissioners v. Snider et al.*, [1925] 2 D.L.R. 5 (P.C.) (*Snider*)).

[28] *Snider* declared that the *Industrial Relations and Disputes Investigation Act*, passed by Dominion Parliament in 1907, a labour relations statute of general application throughout Canada, was beyond the powers of Dominion Parliament because of the conflict with the provincial power to legislate for property and civil rights, which is now at section 92(13) of the *Constitution Act, 1867*.

[29] Dominion Parliament subsequently amended that same statute to specify that it applied only to the labour relations of employers and employees employed “on or in connection with the operation of any federal work, undertaking or business.” Those key words—on or in connection with the operation of any federal work, undertaking or business—have been consistently carried forward in each subsequent reiteration of the federal industrial relations statute. Those key words now appear

at section 4 of the *Code*. Federal jurisdiction over labour relations exists, therefore, but only with respect to those employees employed on or in connection with the operation of a federal work, undertaking or business.

[30] Of course, to decide this application for certification or, more specifically, to determine the employer's objection to our jurisdiction, the Board must first determine whether the marine surveyors in the proposed bargaining unit are employed on or in connection with the operation of a federal work, undertaking or business. In short, this case turns on the interpretation and application of section 4 of the *Code*.

[31] The essential yet exceptional nature of federal jurisdiction over labour relations has been reiterated many times by the courts. In 1979, in *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754 (*Construction Montcalm*) (citing *Snider*) the Supreme Court of Canada stated:

...Parliament has no authority over labour relations as such nor over the terms of a contract of employment. ...By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject...

(page 768)

[32] In 2009, in *Consolidated Fastfrate*, the Supreme Court of Canada said: "it is only where a work or undertaking qualifies as federal that provincial jurisdiction is ousted." (*Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53; [2009] 3 S.C.R. 407 (*Consolidate Fastfrate*) at paragraph 27).

[33] In 2010, in *NIL/TU, O*, the Supreme Court of Canada said: "since [*Snider*], Canadian courts have recognized that labour relations are presumptively a provincial matter, and that the federal government has jurisdiction over labour relations only by way of exception" (see *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45; [2010] 2 S.C.R. 696 (*NIL/TU, O*) at paragraph 11).

[34] This exception has always been narrowly interpreted (*Consolidated Fastfrate* at paragraph 27; *NIL/TU, O* at paragraphs 11 and 51).

b—Federal Jurisdiction over otherwise Local Works and Undertakings

[35] The jurisprudence establishes that an employee may be employed on, or in connection with, the operation of a federal work, undertaking or business for the purpose of section 4 of the *Code*, even though that employee is employed by what would otherwise be a local work or undertaking within a province. Stated another way, in some circumstances, a group of employees may not be directly employed by a federal work or undertaking itself but may become subject to federal jurisdiction by the nature of the work that the group of employees performs on behalf of a core federal work or undertaking.

[36] There are two main ways in which the labour relations of the employees in the proposed bargaining unit can be held to be federal: either their employer, Certispec, is itself a federal work undertaking or business or, if not, if their work, as marine surveyors in the MTSG at Certispec, is integral to the operation of another, existing, core federal work or undertaking. In *Central Western Railway*, the Supreme Court of Canada considered constitutional jurisdiction over labour relations of employees of a railway company operating a 105 mile long line of railway located wholly within the boundaries of one province and therefore otherwise presumed to be a local work or undertaking:

There are two ways in which Central Western may be found to fall within federal jurisdiction and thus be subject to the *Canada Labour Code*. First, it may be seen as an interprovincial railway and therefore come under s. 92(10)(a) of the *Constitution Act, 1867* as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under s. 92(10)(a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is *itself* an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking.

(*United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112 (*Central Western Railway*); pages 1124-1125; emphasis in original)

[37] In the case now before this Board, the union does not claim that Certispec itself is a federal work or undertaking. However, the union argues that the Board does not need to make any such finding with respect to the operations of Certispec itself. Moreover, the union does not claim that the MTSG, a division within Certispec, is itself and in isolation, a federal work or undertaking. Rather, the union argues that the work performed by the marine surveyors in the MTSG is integral to a core federal work or undertaking, engaged in the operation of navigation and shipping. In other words, the union argues that the work of the marine surveyors at issue is an integral part of navigation and shipping, including the operation of ships and transportation by ship within the meaning of sections 2(a) and 4 of the *Code*.

[38] Federal jurisdiction in the second situation, namely the application of section 4 of the *Code* to employees of what would otherwise be a local work or undertaking, is the subject of a series of decisions dealing with the work performed by stevedores, by local truckers involved in mail delivery and by the workers in the installation department at Northern Telecom Limited (Northern Telecom). In each case, the Supreme Court of Canada held that these workers were subject to the *Code* even though they were not employed directly by the federal work or undertaking which contracted for and depended upon their work.

[39] In the *Reference re: Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (*Stevedoring Reference*) the Supreme Court of Canada confirmed that the federal government did have jurisdiction to legislate in the area of labour relations for employees employed on or in connection with the operation of federal works and undertakings. This jurisdiction extended to employees of an otherwise local work or undertaking, where the work they performed was vital or essential or integral to the operation of a core federal work or undertaking. It also held that stevedoring comes within the scope of the exclusive federal jurisdiction over navigation and shipping at section 91(10) of the *Constitution Act, 1867*. The Court held that the statutory words "on or in connection with" applied only to work that was an integral part of, or necessarily incidental to, the operation of an enumerated federal undertaking, such as navigation and shipping (the *Stevedoring Reference*; pages 564 and 566). Those statutory words did not, therefore, capture

or apply to persons “performing merely casual services” upon or in connection with a federal undertaking (page 556). However, throughout its reasons for decision, the Court spoke repeatedly of the loading and unloading of ships, an activity it characterized as:

- an essential part of the transportation of goods by water (pages 541; 572 and 591)
- an integral part of shipping (page 584)
- part and parcel of the activities essential to the carriage of goods by sea (pages 537 and 578)

[40] The loading and unloading of ships was identified as stevedoring when performed by persons other than members of the ship’s crew (the *Stevedoring Reference*; page 591). The transportation of goods by water by means of ships was identified as an operation “entirely dependant” on the services of stevedores (the *Stevedoring Reference*; page 543).

[41] The *Stevedoring Reference* was summarized in the *Central Western Railway* case as follows:

This Court found the [federal labour] legislation in question to be *intra vires* the federal government. In an eight to one decision, the stevedoring operations were found to be an integral or essential part of the interprovincial or international transportation of goods by ship. The operational connection and integration between the federal undertaking and the stevedores was complete – the stevedores were an essential “link in the chain” of the federal operation. Effective performance of the federal undertaking would not be possible without the services of the stevedores. Federal jurisdiction there seems to have been based on a finding that the core federal undertaking was dependent to a significant degree on the workers in question.

(page 1137)

[42] The 1983 decision of the Federal Court of Appeal in *Cargill Grain Company Limited, Gagnon and Boucher Division v. International Longshoreman’s Association Local 1739, et al.* (1983), 51 N.R. 182 (F.C.A., no A-799-81) (*Cargill Grain*) put the scope of the “integral or essential” nature of the work in the *Stevedoring Reference* into a somewhat sharper and narrower focus, at least with

respect to work performed at or in the vicinity of a port. The Federal Court of Appeal held that employees engaged in operating and maintaining grain silos at the Port of Québec City are not engaged in the operation of a federal work or undertaking.

[12] The employees of applicant in question here do not unload ships; this work is done by members of the ship's crew. Applicant's employees operate and maintain equipment which transports grain to silos (after it has been unloaded and moved to applicant's facilities) and then moves it on to the trucks of applicant's customers. When these employees perform this work, the maritime transport has ended, since the goods have arrived at their destination and are in the possession of the recipient. For this reason, the work of these employees does not seem to me to be connected with transport, but rather with the grain business operated by applicant in Quebec City.

[13] It is quite true that a majority of the judges of the Supreme Court of Canada expressed the opinion, in **Eastern Canada Stevedoring Reference**, [1955] S.C.R. 529, that the federal Parliament had legislative authority to regulate the labour relations of the employees of a stevedoring business who, working for maritime carriers, loaded and unloaded vessels, handled and stored goods after they had been received from shippers until the time of loading, and from loading until the time of delivery to the recipient. In that case, however, all the work was done for the maritime carriers before the transport had ended. It could therefore be regarded as a necessary incident to maritime transport. The opinion given by the Supreme Court in **Eastern Canada Stevedoring** does not seem to me to have any application in the case at bar.

[sic]

(*Cargill Grain*; emphasis in original)

[43] Regarding the scope of the federal exception in labour relations, the court held, in effect, that the handling of a commodity on a pier within a port, once that commodity has been unloaded from a vessel engaged in international shipping, did not always constitute longshoring work. By extension, the work performed by the Cargill employees on the pier within the port was not vital or integral to the operation of a federal work, undertaking or business. Mr. Justice Hugessen remarked:

[36]...In some cases, as ancillary to this principal operation, it may also include the handling and storage at dockside of goods which have been loaded or unloaded. But surely that does not mean that all handling and storage at dockside is necessarily longshoring, especially when such operations are carried out as ancillary to other activities which have nothing do with the loading or unloading.

[37]...The employees of the applicant who look after the handling and storage on the dock are only receiving goods which have already been unloaded. Even then, they spend only a tiny proportion of their time on this aspect of their work...

[44] For our purposes, *Cargill Grain* indicates that work is not necessarily federal simply because it is performed in a port and involves commodities or cargos that have been transported by ship engaged in international commerce.

[45] In 1975, in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.*, [1975] 1 S.C.R. 178 (*Letter Carriers*), the Supreme Court of Canada held that truck drivers, employed by a local work or undertaking were employed in on or in connection with the Canada Post Office (as it then was), a federal work, undertaking or business under section 91(5) of the *Constitution Act, 1867*. The Court noted that their employer, engaged in the transportation of goods by truck, held a number of contracts with the Canada Post office for the delivery and collection of mail and that it performed 90% of its work for the Canada Post office. The labour relations of the employees of that otherwise local work therefore came within the federal exception set out in *Stevedoring Reference*.

[46] In *Northern Telecom Canada Limited et al. v. Communication Workers of Canada et al.*, [1983] 1 S.C.R. 733 (*Northern Telecom*, 1983), the Supreme Court of Canada found that the work of the installation dept within Northern Telecom, itself otherwise a local work, was a vital or integral part of the operations of Bell Canada, a federal work, undertaking or business in the telephone and telecommunications field. Installation work for Bell Canada represented 80% of the work of the Telecom Canada installers. Bell Canada bought 90% of its switching and transmission equipment from Telecom Canada, and 95% of all such equipment bought by Bell Canada was installed by Telecom Canada. The labour relations of those employees of Northern Telecom working as installers were therefore within federal jurisdiction. The balance of the employees of Northern Telecom (those not involved in installation work) remained subject to provincial jurisdiction. The Supreme Court of Canada made the finding of federal jurisdiction with some hesitation. In his majority reasons, Mr. Justice Estey said that he reached his decision with "much hesitation" (page 767). Mr. Justice Dickson, in concurring reasons, said: "Although I think this case is very close to the boundary line between federal and provincial jurisdiction, I am persuaded that the installers fall under federal jurisdiction" (page 775).

c- The Functional Test

[47] In *Northern Telecom*, 1980, Mr. Justice Dickson of the Supreme Court of Canada enumerated a test to determine whether the employees of an otherwise local work are employed on or in connection with the operation of a federal work, undertaking or business. The test refers to the need,

first, to determine whether a core federal undertaking was present, and, if so, the extent of that undertaking. It was then necessary to look at the “particular subsidiary operation” (which, in our case, is the work performed by the MTSG) to determine the normal and habitual activities of the subsidiary operation as a going concern. Finally, it was necessary to examine the practical and functional relationship between the two (*Northern Telecom*, 1980). That physical and operational connection has been variously described in the jurisprudence as the vital or essential or integral nature of the work. Consistent with *Central Western Railway*, the vital or essential or integral nature of the work would include the dependency, if any, of the core federal undertaking on that work. In *Northern Telecom*, 1983, Mr. Justice Dickson described the third factor of the test as “obviously the most critical” in determining whether the federal Parliament or the provincial legislature has constitutional jurisdiction (page 772). It is also significant to note that the Supreme Court of Canada did not intend the test to be cast in stone. Writing in 1990, in *Central Western Railway*, Mr. Justice Dickson (who had crafted the test in 1979) stated:

The principles enunciated in *Northern Telecom No. 1* are not intended to be applied in a strict or rigid manner; instead, the test should be flexible and attentive to the facts of each particular case.

(pages 1139-1140)

[48] As recently as November 2010, the Supreme Court of Canada reiterated that the appropriate test may be succinctly stated as a “functional test” which calls for an inquiry into the nature, habitual activities and daily operations of the entity in question to determine whether it constitutes a federal work, undertaking or business (*NIL/TU,O*).

[49] Several common factors may therefore be identified among the relevant constitutional facts underlying the decisions in the *Stevedoring Reference*, the *Letter Carriers’* case, *Northern Telecom*, 1980 and *Northern Telecom*, 1983. Those common factors allowed the Court to find that the practical and functional relationship between the operations of a core federal undertaking and the work performed by the particular subsidiary operation was sufficient to support federal jurisdiction. The common factors regarding the nature of the subsidiary work variously included: the work is done for or at the request of a specific customer who operates a core federal undertaking; the work is all, or essentially all, performed for a single dominant customer; the work

is done pursuant to a fixed term contract; the work is carried out subject to the supervision or control of the employees of a core federal undertaking; the work has previously been performed by the employees of the core federal undertaking or the employees of the core federal undertaking would themselves be capable of performing the subsidiary work. These are just some of the common factors or indicia of the type of practical and functional relationship required. Obviously, not all of the common factors or indicia are present in each of the four cases at issue, nor do they need to all be present. We are not saying that all of the common factors must all be present to find federal jurisdiction. However, it is clear that the greater the number of common factors that are present, the easier the task of finding that the normal and habitual work of the subsidiary operation is vital or essential or integral to the operation of a core federal work.

[50] The certification application now before the Board deals with three people, employed by Certispec and working as marine surveyors in the MTSG. The applicant union says those marine surveyors are subject to the *Code*; the employer says they are not. In other words, and having regard to section 4 of the *Code*, either they are employed on or in connection with the operation of a federal work, undertaking or business, or they are not.

2-Tribunal Decisions

[51] This Board, its predecessor and other labour relations tribunals have also determined whether the normal and habitual work performed by employees of an otherwise local undertaking is or is not vital or essential to the operation of a core federal undertaking. The decisions summarized below were not varied upon review by the courts. Many of these decisions involve work that was done on or around a port.

[52] Ship chandlers in a port have been found not to be employed on or in connection with the operation of a federal work or undertaking. In 1974, the Ontario Labour Relations Board (OLRB) held that it had jurisdiction over employees of a "ship chandler" engaged solely in supplying ships in the Port of Thunder Bay with provisions (such as produce, meats, vegetables, hardware and ropes) necessary for the day-to-day functioning of the ships and their crews. The provisions were supplied as needed, 24 hours per day, from its warehouse in Thunder Bay. Approximately 95% of its business

related to ships involved in the international transportation of goods by sea. The respondent provided its services to approximately 75% of the ships coming into the Thunder Bay area. The OLRB concluded that it had jurisdiction to entertain an application for certification of the respondent's employees because the operations consisting of "ship Chandler" services as provided by the respondent were not an integral part, nor were they necessarily incidental to the federal undertaking of "Navigation and Shipping." The OLRB characterized the "ship Chandler" services, from the perspective of the operation of the core federal works, as a "convenience" (*North Shore Supply Co. Ltd.*, [1974] OLRB Rep. July 446).

[53] Water taxi services to carry people between a port and ships waiting at anchor to enter the port have been held not to be vital or essential to the operation of federal transportation undertakings by sea. In 1980, the British Columbia Labour Relations Board (B.C. Board), in *Tymac Launch Service Ltd.*, [1980] 3 Can LRBR 552 (B.C.) (*Tymac*), examined a company operating a launch service in the Port of Vancouver. The company operated a fleet of nine water taxis to transport people back and forth between the Port and ships waiting at anchor. Although the water taxis occasionally carried freight, 95% of their trips involved the transportation of people. The water taxis variously transported the crew of the ship as well as the pilot of the vessel, customs officers as well as federal government officials from the departments of Immigration, Agriculture and Transportation, who were required to board the ship upon its arrival. There was no doubt that ships at anchor were involved in the international transportation of goods by sea. The B.C. Board held that the water taxi service was merely "incidental" to the operation of the federal shipping undertakings. The service was not essential or vital to the operation of shipping and did not therefore displace provincial jurisdiction over labour relations of the persons employed by the launch company. The B.C. Board considered this a "borderline" constitutional case but held that the launch service remained a provincial undertaking.

[54] Tugboat operations in a port has been found to be federal. In 1981, the OLRB refused to assume jurisdiction over the employees of a company operating tug boats primarily in and around the Port of Hamilton as well as, from time to time, interprovincially and internationally. The OLRB held that the company's tug boats were involved in four main activities: (1) the pushing of a fuel barge and (2) the docking of ships, all within the Port of Hamilton, (3) periodically towing vessels

from Ontario to other provinces or to the United States of America and (4) tending buoys off the coast of Newfoundland. Applying the *Northern Telecom*, 1980 test, and looking at all those activities as a whole, the OLRB held that the employer's tug boat operations were an integral part of or necessarily incidental to the "Navigation and Shipping" undertakings operated by many of the customers to which the respondent provided its "varied aquatic services." The OLRB therefore dismissed an application for certification for a unit of employees working aboard those tug boats for want of jurisdiction (*Seafarers' International Union v. Wakeham & Son Ltd.*, [1981] OLRB Rep. 1036 (*Wakeham*)).

[55] Tugboat services have also been held by this Board to be vital or essential to the operation of a federal marine transportation undertaking. In its 1999 decision, *Rivtow Marine Ltd. and Tiger Tugz Inc.*, 1999 CIRB 30, the CIRB examined the operation of Tiger Tugz Inc. which operated a ship berthing service in the Port of Vancouver. It operated two tugboats. This Board held that Tiger Tugz Inc. operated exclusively in the Port of Vancouver under contract with ship owners or ship agents, and that 99% of the work that Tiger Tugz Inc. performed involved the berthing or docking of ships involved in the international transportation of goods. The Board held that pursuant to sections 2(a) and 4 of the *Code* the services performed by Tiger Tugz Inc. were integral to the operation of international shipping. Among other things, the Board observed that a 1981 decision of the OLRB had found a tug boat service to be essentially federal (*Wakeham*). This Board held that the employees of Tiger Tugz Inc. were therefore employed on or in connection with the operation of a federal undertaking and subject to the *Code*.

[56] The work of cargo inspection, sampling and testing performed from time to time in and around a Port have been held not to be vital, essential or integral to the operation of federal undertakings involved in international transportation of goods by sea. In its 1992 decision, *SGS Supervision Services*, the CLRB addressed the services provided by SGS. SGS was in the business of providing independent inspection, testing and analysis both quantitative and qualitative, of goods and commodities exchanged in commercial transactions. Some of this work was performed in and around ships at a Port. Although the company did employ marine surveyors and did perform marine surveying work, the certification application before the Board did not require it to address the type of work performed by the marine surveyors employed by SGS. In that case, the CLRB held

that there was no discrete federal work or undertaking that could be identified as a core federal undertaking for the purposes of the *Northern Telecom*, 1980 test. Moreover, the Board rejected the argument that the work performed by those employees of SGS was integral to shipping and navigation. The Board held that there was insufficient linkage of the sort necessary between a federal marine transportation undertaking and the work performed by the subject employees of SGS to support a finding of federal jurisdiction. Significantly, the Board considered the nature of the work performed by the cargo inspectors and samplers and testers at SGS, and held: "The confirmation of the quantity or the quality of the goods being shipped is a facet of the commercial transactions separate from the actual transportation of the goods" (page 137). It is recalled that the Board referred to *SGS Supervision Services* in Part 1 of these reasons for decision.

V-Evidence

A-Documentary Evidence

[57] The documentary evidence helped the Board to understand what it is that the marine surveyors in the MTSG do day-to-day. This helped us to ascertain the type of work that they perform on a normal and habitual basis as a going concern. Three types of documents were of particular value: the excerpts of the Certispec website, including the page of the web site devoted to the services performed by the MTSG (exhibit 5, tabs 25 and 29); the schedule of professional fees charged by the marine surveyors in the MTSG for their work (exhibit 5, tabs 10 and 35); and the employer's analysis of each Certispec division by revenues (exhibit 5, tab 27), including the break down of the type of services performed by each of the three marine surveyors (based on the number of jobs). Certispec also produced the supporting documentation upon which that analysis was based (exhibit 5, tab 28 and exhibit 4).

1-Website

[58] According to its website, Certispec was created to provide independent inspection, sampling and surveying and laboratory testing services. It provides those services to clients in the agricultural, food, forest products, petroleum, petrochemicals, marine, metals and mineral industries. It says its

role and objective is to provide risk management by conducting an independent assessment of the quality, quantity, performance and movement of goods changing hands in commercial transactions and in industrial applications. It says its services are provided by competent surveyors, inspectors, and laboratory technicians, whose backgrounds range from engineers, master mariners, chemists and technicians to personnel whose orientation is primarily commercial.

[59] The website uses a common header to summarize and capture these services: "independent marine surveying • inspection • sampling • laboratory testing." This header appears on, and is used on, each page that describes the services provided by each division of the company. At the time the application for certification was filed, the five Certispec divisions were Laboratory, Petroleum/Petrochemical, Vegetable Oil, Dry Bulk and, of course, the MTSG. The Dry Bulk division was renamed Bulk Solids and is referred to as Bulk Solids in the balance of this decision.

[60] The MTSG has its own page within the Certispec website. We have reproduced the list of services it offers exactly as it appears on that page of the website:

Condition Surveys

Detailed, independent assessment of condition of deep sea vessels both before and after being taken on hire.

Hold Cleanliness Surveys

Visual inspections of cargo holds to determine their acceptability for the carriage of specific cargoes.

Inspections of cargo gear and records to determine compliance with international maritime standards.

Our surveyors are F.I.F.A. (Fertiliser Industry Federation of Australia) approved for the pre-loading inspection of deep-sea vessels intending to transport commodities to Australia.

Vetting Surveys

Vetting of deep-sea tankers, tank barges and tugs as per O.C.I.M.F. requirements by our qualified SIRE inspectors.

ISPS Security Assessments

Our surveyors have all successfully completed recognized training courses to enable us to provide independent assessments of vessel security plans as required by the new IMO ISPS (International Ship & Port Facility Security) Code.

Draft Surveys

Independent certification of cargo weights loaded / discharged based upon displacement surveys taken before and after loading. Surveys are conducted to internationally accepted standards.

P & I Surveys

Surveys conducted on behalf of P & I clubs as an independent assessment of any reported damages to either the vessel or its cargo.

[61] The Board heard oral evidence that there has been essentially no demand for the MTSG to provide International Ship and Port Facility Security (ISPS) Security Assessments.

2-Fee Schedules

[62] Certispec publishes a schedule of professional fees for services provided by three marine surveyors in the MTSG at Certispec. The Board also understands the exhibit to be a more or less exhaustive list of the various types of work performed, from time to time, by the three marine surveyors at issue. There are two such fee schedules in evidence, with effective dates of January 2008 and January 2011. In each case, the list of services is the same and the list of services is set out under the general heading of "Marine Technical Surveys."

[63] The fee schedules list eleven types of marine technical surveys performed by the marine surveyors in the MTSG. The list below sets out the services in the same order as they appear on the fee schedules. Please note, however, that the descriptions or comments that follow each enumerated heading are those of the Board based on its review of the schedules:

1. Draft surveys
 - The fee schedule distinguishes between initial, intermediate and final draft surveys as well as check surveys.
2. Condition surveys
 - The fee schedule distinguishes between two types of condition surveys, these are: on and off hire condition surveys, charged on a "per hold" basis and pre-purchase condition surveys.
3. On or off hire bunker surveys

4. Visual hold inspection
 - Charged on a "per hold" basis.
 - The fee schedule distinguishes between two types of visual hold inspections, namely an ordinary visual hold inspection and one that is conducted to be compliant with the requirements of the Fertiliser Industry Federation of Australia (F.I.F.A.), as further set out at section 11 of the fee schedule.
5. Container on or off hire surveys
6. Damage / outturn surveys
7. Photographs
8. Hatch sealing
 - The fee schedule indicates that this work may be done in conjunction with another survey or performed as a separate survey.
9. Pre-loading / discharge safety and anti-pollution surveys
 - The fee schedule indicates that three types of work are captured under this heading.
 - Completing a safety check list.
 - Monitoring shipboard operations throughout loading / discharge of cargo.
 - Vetting of oil tankers and barges.
10. Other services
 - The fee schedule indicates that these other services may include consultation, loss control services, expert testimony or P and I surveys.
11. F.I.F.A. compliant inspections
 - The fee schedule indicates that these inspections may include hold inspection (initial inspection prior to loading, during and after cleaning – where required) or walk-over inspection (during and/or after loading).

3–Breakdown of Revenues and Work Load

[64] Based on Certispec's analysis, the Bulk Solids division was the most significant part of its operations, generating over 60% of Certispec's revenues for the period of time prior to August 31, 2010 (exhibit 5, tab 27). The MTSG generated less than 10% of Certispec's revenues.

[65] Certispec also undertook an analysis of the type and number of individual jobs performed by the three marine surveyors in the MTSG in the period from November 2009 to August 2010 (exhibit 5, tab 28). This work was undertaken after the certification application was made to the Board. The information in the analysis was used by Certispec to prepare their response to the certification application. The results of the analysis were set out in an email dated October 8, 2010, which formed part of Certispec's pre-hearing production of documents. In other words, the union had this information prior to the start of the hearing.

[66] The analysis grouped the type and number of jobs performed by the marine surveyors under seven different headings:

- Hold inspections
 - Draft surveys
 - Vetting [surveys]
 - Loading master
 - [P and I] insurance [surveys]
 - On-hire [condition surveys]
- and
- Pre-purchase [surveys]

In other words, the seven headings used in the October 2010 analysis are similar to, but do not correspond exactly to, the headings used in the schedule of professional fees.

[67] The essential core of the work of the marine surveyors in the MTSG for this period of time, based on the results of Certispec's analysis, falls under three of the seven headings: hold inspections (almost 30% of the work), draft surveys (approximately 25% of the work) and vetting surveys (slightly less than 25% of the work). These percentages are based on the number of jobs undertaken by each marine surveyor; they are not based on revenues.

[68] The union witness did not necessarily accept the percentage figures found in the Certispec analysis. He did agree, however, in response to a question from the panel, that the work the marine surveyors most often perform does fall under the three categories of hold inspections, draft surveys and vetting surveys. The union witness, in his evidence, put considerable emphasis on the work of the marine surveyors when acting as loading masters. According to the Certispec analysis, loading master work represented less than 15% of the work performed in the subject period. According to the union witness, it represented a greater percentage and perhaps as much as 25% of the work of the MTSG.

[69] The results of the analysis also clearly indicate the exceptional, or non-core, nature of some of the work performed by the three marine surveyors in the same period of time. The non-core work also falls under three of the seven categories: P and I insurance surveys, on-hire condition surveys and pre-purchase surveys. Considered together, the work performed under these three heading amounted to less than 10% of the total work of the MTSG.

[70] Based on all of the above documentary evidence, the Board finds that it does not need to consider the nature of the work performed by a marine surveyor when performing a pre-purchase survey, an on-hire condition survey or a P and I insurance survey. In our view, those tasks do not arise with sufficient frequency to be considered part of the normal and habitual work of the three marine surveyors at issue.

[71] As part of its survey of the *viva voce* evidence, the Board will elaborate on the nature of the work performed by a marine surveyor to conduct a hold inspection, a draft survey and a vetting survey. The Board will also comment on the nature and role of a marine surveyor when acting as a loading master.

[72] It is interesting to note the absence of some types of documentary evidence. The employer's analysis (exhibit 5, tab 28) indicates that hold inspections alone constitute the majority of the work of the marine surveyors at about 30% of the work performed by the MTSG. The oral evidence, summarized in the next section of these reasons for decision, indicates that the end product of a hold inspection is a document called a certificate of cleanliness.

[73] The employer's analysis indicates that draft surveys constitute about 25% of the MTSG workload. The oral evidence indicates that the end product of a draft survey is a document called a certificate of weight.

[74] Neither party provided the Board with a copy of either of these types of certificates.

[75] The employer's analysis indicates that vetting surveys constitute about 25% of the work of the MTSG. The oral evidence indicates that a marine surveyor conducts this work according to a checklist prepared and published by the Oil Companies International Marine Forum (OCIMF). The result of the survey are published in a database. Neither party provided the Board with a copy of this checklist or a sample of the database.

[76] Loading master work represents less than 15% of the work of the MTSG, according to the employer. Two witnesses said that loading master work is also performed according to another checklist. No copy of such a load master checklist appears on the record of this proceeding.

[77] Finally, there is no copy of any written contract on the record of this proceeding. By extension, there is no evidence of a written contract between Certispec and any core federal work or undertaking engaged in navigation and shipping generally or in the international transportation of goods by sea specifically. In other words, there is no evidence in the form of a written contract to demonstrate the type of work that such a core federal undertaking would hire the marine surveyors in the MTSG to perform.

B—*Viva Voce* Evidence

[78] The Board heard *viva voce* evidence from three witnesses with a background working as a marine surveyor. Neither party called any witnesses employed by or involved in the operation of any federal work involved in navigation and shipping.

[79] The applicant union called Captain Rebello, a master mariner. He is employed by Certispec and performs the duties of a marine surveyor, among other roles. He is one of the three marine surveyors in the proposed bargaining unit. He has many decades of experience in many aspects of the operation of ships for the international transportation of goods by sea.

[80] The respondent employer called Mr. Paul Armstrong; he is Certispec's Regional Manager of West Coast operations. He was the person at Certispec who prepared the documentary evidence giving the breakdown of revenues by division and the analysis of the tasks of the MTSG. The employer called Mr. Richard Smith; he is the Certispec Vice-President, Quality Manager and I.T. Manager. Both have experience working as marine surveyors, in the past, whether at Certispec or other companies. Neither is currently working full time as a marine surveyor, although Mr. Smith occasionally performs vetting surveys with the goal of maintaining his accreditation under the Ship Inspection Report Programme (SIRE).

[81] The MTSG at Certispec is composed solely of the three marine surveyors in the proposed bargaining unit. They are employed full time. From time-to-time, Certispec hires subcontractors to perform some of the marine survey tasks of the MTSG, as the work load demands.

[82] The oral evidence confirms the documentary evidence regarding the type of work performed, namely that the marine surveyors in the MTSG spend most of their time on a day-to-day basis, performing four generic marine surveying tasks: hold inspections, draft surveys, vetting surveys, and to a lesser extent loading master work.

[83] A Certispec marine surveyor will often perform both of the tasks of hold inspection and draft surveys for the same Certispec client. That client may also retain Certispec to perform sampling work of the cargo being shipped. The sampling work is performed by a Certispec employee in another division in the company and is not usually performed by a marine surveyor in the MTSG at Certispec. Mr. Paul Armstrong said some 30% of Certispec's sampling clients also hire Certispec to perform hold inspections and draft surveys regarding the same cargos.

[84] As stated, the marine surveyors in the MTSG also perform vetting surveys and work as a loading master. These two tasks are distinct and are not related to each other in a manner similar to the hold inspections or the draft surveys. Moreover, the nature of these two tasks is essentially different than the nature of the hold inspections and draft surveys.

[85] The evidence, as the Board understands it, suggests that a vetting survey is a distinct activity. In other words, where a client engages a marine surveyor at Certispec to perform vetting work, that client does not also engage other Certispec employees in other divisions to perform other Certispec services. As we will see in more detail, the MTSG performs all of its vetting surveys for a single client, an oil company or a so-called oil major. The MTSG also currently performs all of its load master work for a single client, a terminal operator within the Port of Vancouver.

[86] The Board will therefore focus its summary of the oral evidence on the four tasks normally and habitually performed by the three marine surveyors at issue in this application for certification: hold inspections, draft surveys, vetting surveys and loading master work.

1-Hold Inspections

[87] A hold inspection is the visual inspection of the hold of a vessel by a marine surveyor. This is the same task identified on the Certispec MTSG fee schedule as a "Visual Hold Inspection" and designated as a "Hold Cleanliness Survey" on the page of the Certispec website related specifically to the services offered by the MTSG.

[88] The purpose of the hold inspection is to ensure that the cargo to be loaded into the empty hold of the vessel is not, or will not, be adversely impacted by any condition of the hold. The hold is empty at the time of the inspection.

[89] Captain Rebello indicated that there are various types of hold inspections, or at least various levels of sophistication of hold inspection. Captain Rebello said that some hold inspections are very basic. He said the marine surveyors visually inspect the hold to see if there is any previous cargo

contamination. He indicated that if the cargo to be loaded into the hold is very expensive cargo, then the marine surveyor will look more diligently for anything in the hold that may adversely affect the cargo to be loaded.

[90] Mr. Armstrong described hold inspections and draft surveys as "not highly technical work." He said that a hold inspection is also a type of survey and said that it is also referred to as a "cleanliness survey." He clarified that the end result of the hold inspection is a certificate produced by Certispec to confirm that the hold of the vessel is ready to receive a particular cargo. He told the Board that a client who hires Certispec to conduct a hold inspection is most often the supplier or producer of the cargo. The client is not the ship owner or operator.

[91] Mr. Smith clarified that one particular type of hold inspection is a FIFA (Fertiliser Industry Federation of Australia) inspection. Recall that the Certispec MTSG fee schedule refers to "FIFA Compliant Inspections" as a discrete and separate item. He also indicated that the FIFA inspections are carried out, for the most part, on ships carrying fertiliser in bulk, to Australia. These ships are apparently quite large and contain many holds requiring visual inspection. Mr. Smith clarified that the client for whom Certispec performs the majority of the FIFA inspections is the receiver of the cargo. The Board heard that it is not uncommon for the marine surveyors in the MTSG to enlist the services of two other Certispec employees, from a Certispec division outside the MTSG, to assist them in conducting the FIFA hold inspections. As the Board understands it, the extra two people are required given the number of holds to be inspected on each ship that is subject to a FIFA hold inspection. The only work they perform, from time to time, for the MTSG is hold inspection work and then specifically only FIFA hold inspections. Otherwise, they work within a different division at Certispec.

[92] In the period of time under review in exhibit 5, tab 28, Captain Rebello performed very few hold inspections. Most of the hold inspections were performed by the two other marine surveyors in the MTSG who are less experienced. Some were performed by subcontractors.

2-Draft Surveys

[93] Captain Rebello told us a draft survey is also sometimes referred to as a dead weight survey. He confirms that in order for a marine surveyor to perform a draft survey, the marine surveyor must go onboard the vessel and must, among other things, check the water ballast, onboard the vessel. Captain Rebello also confirmed that a draft survey may be performed, on occasion, where there is no cargo to be loaded to ascertain the "light weight" or light displacement of the vessel.

[94] The three witnesses with experience working as marine surveyors all agree that the purpose of a draft survey is to ascertain the weight of a particular cargo loaded onboard a vessel. The weight of the cargo is a function of the difference between the displacement (or draught) of the vessel in the water, most frequently, when the hold is empty (before the cargo is loaded) and the displacement upon completion of the loading of the particular cargo (when the desired amount of cargo has been loaded into the hold or holds of the vessel). The displacement of the vessel in the water is indicated by marks or measurements on the exterior of the vessel.

[95] Mr. Armstrong told us a draft survey can also be referred to as a cargo survey. Mr. Smith defined a draft survey as: in "basic terms, the marine surveyor is measuring the displacement of a vessel in the water, before and after loading of the cargo, and comparing the dead weights to ascertain the weight of the cargo."

[96] He stated Certispec performs a draft survey for the shipper or receiver of a product, and sometimes jointly for both, to verify the quantity of cargo being shipped. The purpose of the draft survey, he said, is to enable Certispec to produce a report or a certificate to quantify the amount of cargo loaded to the hold of a ship. The certificate is called a certificate of weight. Certispec sends its report or certificate directly to the shipper or receiver of the cargo or to their load agent. The Certispec report or certificate is part of the documentation required by the shipper or receiver to effect payment of the cargo.

[97] Mr. Armstrong confirmed that Certispec performs a draft survey in order to produce "a certificate of weight." Certispec then provides the certificate of weight to either the receiver or the seller of the product (cargo). Certispec does this, he says, on behalf of the owner of the cargo. It is not done, according to him, for or at the request of the ship owner or operator.

[98] According to exhibit five, tab 28, page 2 in the subject time frame, all of the draft surveys were performed by the two less experienced marine surveyors sought to be included in the proposed bargaining unit. Some of the draft surveys were also performed, during that period of time, by subcontractors. None were performed by either Captain Rebello or Mr. Smith.

3-Vetting Surveys

[99] Vetting surveys, also referred to simply as "vetting", also involve a visual inspection performed by a marine surveyor. It is a visual inspection of certain types of vessels (oil tankers, tugs or barges or oil-carrying barges) against a checklist. The checklist is not created by Certispec itself. The checklist is created by the OCIMF or Oil Companies International Marine Forum. Further, the vetting is performed as part of the SIRE program at the OCIMF.

[100] As the Board understands the evidence, all of the vetting surveys that Certispec performs are done by the MTSG and 100% of the vetting work is OCIMF/SIRE work. Further, the SIRE program is primarily a risk mitigation scheme adopted by the oil industry, following the 1989 Exxon Valdez disaster involving a spill of oil while being transported by sea. Captain Rebello identified the vetting surveys, again which are synonymous with OCIMF/SIRE inspections, as involving safety and pollution control.

[101] Although the SIRE program itself extends to the vetting of oil tankers as well as the tugs and barges involved in the transportation of oil by vessel, the MTSG performs vetting work on tugs and barges only. Either for want of demand or of qualifications, the MTSG is not called upon to vet oil tankers themselves.

[102] Once the marine surveyor has vetted a tug or barge by completing the OCIMF/SIRE checklist, the completed checklist is uploaded to a database contained on the OCIMF website. The database is accessible only by the oil companies who are members of the OCIMF. Those oil companies, also referred to as "oil majors" in the language of the trade, use the information in the database to decide whether to hire a particular tanker, tug or barge to move their products, primarily petro-chemical products. The Board heard that in the subject period of time, vetting surveys constituted about one quarter of the MTSG workload, and that all of the vetting work was performed for a single customer, one of the so-called "oil majors."

[103] The vetting work can be performed at various times. It is not related, or linked, to the time at which a specific movement of cargo by vessel will occur. Although most of the vetting work that Certispec performs is performed when the subject tug or barge is in or around the Port of Vancouver, there is no requirement that the vetting work be performed in any specific geographic location. It is oil companies who use the information set out in the database to determine whether to use certain equipment to carry oil. The owner or operator of the vessel is not involved in the SIRE program or the vetting work. Moreover, the documentary evidence indicates that a SIRE inspector would be in a conflict of interest if he or she were to act for the owner or operator of a vessel. The OCIMF/SIRE program reminds their accredited inspector that an inspector who subsequently undertakes employment with a ship operator or represents, in any form, a ship operator will lose their OCIMF accreditation (exhibit 5, tab 6).

[104] Certispec does not use sub-contractors to perform vetting surveys. The three marine surveyors in the MTSG all perform vetting surveys. Mr. Smith performs some vetting work himself, with the goal of maintaining his accreditation under the SIRE program.

4-Load Master

[105] A marine surveyor in the MTSG can perform the work of a load master. It is also referred to as a loading master. The name of the task notwithstanding, the marine surveyor may perform this type of work during either the loading or the unloading of a specific type of product from a ship at one specific terminal located within the Port of Vancouver.

[106] Captain Rebello told us that the marine surveyor working as a load master must be onboard the vessel at various times during either the loading or the unloading of the petroleum or crude oil cargos. The goal or purpose of the marine surveyor when performing the work of a load master, according to Captain Rebello, is to ensure that the subject cargo is loaded or discharged "safely and without pollution."

[107] The evidence of the three witnesses is consistent that all of the load master work that Certispec performs is done only at one specific terminal in the Port of Vancouver (even though there are at least six similar terminals within the Port) and usually only during unloading. Moreover, the evidence of those three witnesses is also clear that all of the load master work is done for a single Certispec client (not the same single client for whom Certispec performs the vetting work). That client is the terminal operator.

[108] Mr. Smith told us the story of how the load master function came to exist. In the early 1990s, a small oil spill occurred at a terminal in the Port of Vancouver during the unloading of petroleum products from a vessel. The spill was attributable, in part, to the geographic nature of the terminal, generally and specifically because the terminal had to use a number of booster pumps to pump the cargo discharged from the vessel uphill to a tank farm. In those years, prior to the creation of Certispec, Mr. Smith was working as a marine surveyor at another company. The next time a similar vessel was unloading a similar cargo at that same terminal, the terminal manager asked Mr. Smith to attend and to board the vessel to try to avoid a recurrence of a similar incident. He did so and, over time, created a checklist for the load master to complete while present to monitor the discharge or unloading of that particular type of cargo. In other words, it could be said that Mr. Smith invented the load master function and that it is essentially the same function that the MTSG performs today at the same terminal.

[109] Mr. Smith clarified that he understands that a load master is also used during the unloading of petroleum products from a vessel at, at least, one other different terminal within the Port. That work is performed for a different customer and the work is performed by a marine surveyor employed by a company other than Certispec. Mr. Smith clarified that all of the other similar

terminals within the Port which handle petroleum and crude oil shipments do not use or require a load master. There are four such terminals in the Port of Vancouver where similar types of vessels with similar cargoes are unloaded which do not require and do not use a load master.

[110] The load master work that Certispec performs is undertaken by two of the three marine surveyors in the proposed bargaining unit. According to Certispec, load master work constitutes less than 15% of the overall work of the three marine surveyors in the MTSG during the period of time under review. Captain Rebello says he believes it is more than 15% of the work, constituting perhaps as much as one quarter of the MTSG workload.

[111] Load master work is performed by Captain Rebello and one of the two other marine surveyors in the MTSG, as well as by sub-contractors.

VI—Position of the Parties

A—Applicant

[112] The union argues that all of the work of the MTSG is integral to the core federal undertaking of shipping.

[113] Citing section 2(a) of the *Code*, it says that the employees in the proposed bargaining unit are working on, or in connection with, navigation and shipping, including the operation of ships and transportation by ship.

[114] Understandably, it relies upon the 1989 CLRB order, still in effect, certifying a different local of the same union as bargaining agent for a unit of marine surveyors at SGS (Order no. 5487, dated December 20, 1989).

[115] It agrees that the appropriate legal test for the Board to apply is that set out in *Northern Telecom*, 1980, namely whether the work of the MTSG is vital, essential or integral to the operation of shipping. However, the union argues, somewhat in the alternative, that it is sufficient if the work is "reasonably incidental" or "reasonably necessary" to the operation of the core federal undertaking.

[116] Citing and relying upon *Tymac* and *CALEA*, the union argues that the test of vital or essential does not extend to, or require, that the impugned work be something that the core federal undertaking could not function without. It says, in effect, the test does not go that far (see *Canadian Air Line Employees' Association v. Wardair Canada (1975) Ltd.*, [1979] 2 F.C. 91 (*CALEA*); and *Tymac*).

[117] The union concedes that collectively the normal and habitual work performed by the MTSG consists of hold inspections, draught surveys and vetting surveys, followed by load master work.

[118] The union says the work of the MTSG meets the appropriate test because the core work of the MTSG is work on or about the ships. Moreover, it argues that the impugned work focuses on the ship itself and the capacity of the ship to carry cargo safely; it argues therefore that the work of the MTSG is not focussed on the cargo contained in the ship. In other words, the union says that the work of the MTSG can clearly be distinguished from the type of work, performed by employees other than marine surveyors, that this Board found, in 1992, not to be vital or essential to the core federal undertaking of shipping in *SGS Supervision Services*.

[119] The union claims that the international shipping industry depends upon the services of marine surveyors in order to hire or operate ships and be assured of their suitability and condition for cargo to be shipped and that that ships are satisfactory for purchase and, in some cases, for insurance purposes.

[120] The union says that the evidence of Captain Rebello supports the finding that the totality of MTSG work is clearly connected to shipping. In the same vein, the union claims that the totality of the services of the MTSG make commercial international shipping of bulk cargo possible.

[121] According to the union, the services provided by the MTSG are primarily in relation to the condition of the ship, not the cargo, and in large part must be performed on or adjacent to ships. The services are integral to the core federal undertaking of shipping because the shipping industry relies upon them as independent expert third parties to facilitate the charter of ships to transport goods. Unlike the cases like *Tymac*, the international shipping industry would not simply be inconvenienced but still be able to function effectively without the services provided by the marine surveyors. The services are crucial to the industry in the sense that they enable companies to hire ships and be assured of the suitability and condition to those ships.

[122] Hold inspections, the union says, are part of a complex of contractual requirements and, in the case of FIFA inspections, Australian statutory requirements, that allow the international shipping industry to function. Hold inspections, the union argues, are directed at the ship or vessel itself and, more specifically, at the hold of the vessel rather than at the cargo to be transported in the hold upon completion of a successful visual hold inspection.

[123] Draft surveys, the union acknowledges in argument, are performed to determine the weight of the cargo being loaded or unloaded and the weight of the water ballast of the vessel. Having said that, it argues that the work of the MTSG in performing draft surveys moves beyond the cargo carried on ship and is totally and entirely focussed on the ship itself.

[124] Vetting surveys are synonymous with SIRE inspections conducted according to OCIMF criteria. The union says that Captain Rebello testified that these surveys are required by the terminals for barges carrying oil and are done for commercial reasons because of the liability that can arise from a vessel sinking or leaking, especially with oil-based cargoes, due to pollution concerns. It says these surveys are clearly done on and for ships and, more specifically, to ensure that the ship or tug meets the safety criteria to carry the cargo of the oil majors.

[125] Load master work, the union claims, is a requirement of port authorities and of the terminal operator for ships to be permitted to dock and to off-load cargo. The union emphasizes that load master work can only be performed at and upon the actual ship. The union argues that the MTSG is providing this work as a service directly to ship owners or those contracting for the ship to come to port. It says this is work that is integral to navigation and shipping.

B-Respondent

[126] The employer agrees that the appropriate legal test for the Board to apply is the test set out in *Nothorn Telecom*, 1980.

[127] The employer says that the relevant core federal undertaking for the purpose of that test would be the international transportation of goods by sea.

[128] That said, the employer argues that the work of the MTSG is not related to shipping in the constitutional sense and cannot, therefore, be considered vital or essential to the operation of any core federal undertaking.

[129] The employer identifies the main duties of the MTSG as performing hold inspections, draft surveys, vetting surveys and load master work.

[130] The employer reminds the Board that the MTSG is only one of the divisions within Certispec and that the work of the MTSG represents less than 10% of Certispec's annual revenues. Moreover, it accounts for the employment of only three full-time people within that particular division.

[131] While the marine surveyors at issue perform services incidental to the operation of a ship, the employer says these services are not vital, essential or integral to such operation. The employer insists that the operation of a ship does not require the services performed by marine surveyors.

[132] It says the services performed by the MTSG are used, not by the owner or operator of a ship, but by the buyer or seller of commodities to satisfy contractual obligations related to the quality and quantity of the cargo (hold inspections and draft surveys) or to minimize risk related to the use of a barge in the transportation of oil (vetting surveys). The employer argues that load master work is unique; it is performed for only one customer at one terminal, due to the particularity of that terminal. According to the employer, load master work represents less than 15% of the work of the MTSG. The unique role of the load master and the connection of the load master work to loading and unloading of cargo at the terminal is an exception and cannot define the nature of the operation of the MTSG for constitutional purposes.

[133] The employer essentially admits that most of the work of the MTSG takes place on the waterfront, in or around ships. It argues that given the nature of the services themselves, the location at which the work is performed is not determinative of jurisdiction.

[134] In its argument, it emphasized that the work of the MTSG is not required by statute, that the marine surveyors have no statutory authority and that there is no requirement for the services of a marine surveyor in order for a ship to operate. The employer acknowledges that the operation of shipping would be inconvenienced if the services of the marine surveyors did not exist, but it argues that ships would still continue to operate.

[135] It further emphasizes that the services of the MTSG are used, for the most part, by the buyers and sellers of commodities and that there is no evidence of Certispec working under contract for ship owners, operators or shipping companies. It argues that there is no evidence of dependency by those who operate any core federal undertakings upon the services provided by the marine surveyors in the MTSG.

VII—Analysis

A—Constitutional Facts

[136] Based on all of the evidence before it, the Board makes the following factual findings.

1-Certispec

[137] The Board finds that Certispec is a company with a primary place of business in Port Moody, British Columbia. It does not have a place of business in any other province or territory of Canada. The Board acknowledges that Certispec does send some of its marine surveyors, from time to time, to perform marine surveying tasks in Hay River, Northwest Territories. Certispec employs 17 people on a full-time basis and 20 people on a casual basis. It also hires subcontractors on an *ad hoc* basis, from time to time, to carry out its work.

[138] At the time the application was filed, the company was composed of five divisions: bulk solids, petro-chemicals, vegetable oil, laboratory and MTSG. All of those five divisions provide, to one degree or another, directly or indirectly, independent marine surveying, which includes and encompasses inspection, sampling, and laboratory testing of major commodities.

[139] Bulk solids is the largest division at Certispec. It handles, among other things, the surveying and sampling work related to contracts for the purchase and sale of, primarily, sulphur, coal and potash.

[140] Bulk solids alone generates more than 60% of the revenues from Certispec's business. The work of the MTSG represents less than 10% of Certispec's overall revenues.

[141] The Board heard no evidence that Certispec transports any of the commodities or cargos that it surveys, inspects or samples. Certispec is not a carrier.

[142] To ensure that the record is complete, and to avoid any potential confusion with the marine jurisprudence, there is no allegation or suggestion that marine surveyors are the people who operate tug boats or work as pilots onboard vessels. There is no evidence that anyone at Certispec operates tug boats or works as a pilot onboard a vessel.

[143] Similarly, there is no evidence that Certispec itself sends or receives the commodities or cargos that it surveys, inspects or samples. Certispec is not a shipper.

[144] Finally, the Board heard no evidence that the marine surveyors at Certispec are directly involved in the loading or unloading of cargos to or from vessels. The Board acknowledges that a marine surveyor is present at the vessel and on the pier when performing the load master function. In that role, the marine surveyor is acting as an independent and additional set of eyes on behalf of its customer; the customer is not, however, the ship owner or operator. The marine surveyor is monitoring the process of loading or unloading the vessel on behalf of the terminal operator. The Board finds the load master is not directly involved in the loading or unloading of the cargos.

2-MTSG at Certispec

[145] It is the MTSG, or more precisely the three people working as marine surveyors in the proposed bargaining unit, that is the focus of the application for certification. By extension, it is the type of work they perform that is the focus of these reasons for decision.

[146] None of the parties have identified any foundation in Canadian law for the work the marine surveyors at issue perform. In other words, the parties have not directed the Board to any federal or provincial statutes or regulations in Canada regarding marine surveyors or the work they perform.

[147] At the material time, Certispec employed three people on a full-time basis in the MTSG, all of whom were duly accredited as, and worked as, marine surveyors.

[148] The Board finds that the work that the three marine surveyors normally and habitually perform on a day-to-day basis is composed of, in order of frequency, hold inspections, draft surveys, vetting surveys (of oil barges and tugs) and load master work.

[149] Hold inspections, draft surveys and vetting surveys together represent over 75% of the overall workload of the MTSG in the period of time under review.

[150] The MTSG also performs load master work, which represents almost 15% of the total workload of this particular division of Certispec.

[151] To avoid any uncertainty, it is important not to confuse the overall Certispec revenue percentages with the overall MTSG workload percentages. The MTSG is one division of Certispec. For example, while about 75% of the workload of the MTSG is made up of hold inspections, draft surveys and vetting surveys, 100% of the work performed by the MTSG represents less than 10% of Certispec's overall revenues.

a-Hold Inspections

[152] The Board finds that a hold inspection, also known as a hold cleanliness survey or as a visual hold inspection, involves the marine surveyor going onboard the ship and visually inspecting an empty cargo hold (or holds), to ensure that the condition of the hold is such that it will not adversely affect the type of cargo that is next to be loaded into the hold. We heard that it is not uncommon for the hold inspection to be performed when the ship is at anchor, waiting to come into the port for loading. The visual inspection may be performed when the vessel is at the pier in the port.

[153] Hold inspections represent about 30% of the MTSG workload.

b-Draft Surveys

[154] It would seem that marine surveyors have been performing draft surveys for many, many years. The Board found the following definition of "draught of water" in a nautical dictionary:

The depth of water which a vessel displaces when she is afloat. If she be fully laden it is termed the *load water draught*; if unloaded, the *light water draught*. The number of feet which a vessel draws is indicated by figures on the stern and stern post. An *easy draught* of water implies the same as a light draught of water.

(emphasis in original)

This definition is taken from a nautical dictionary published in England in 1863 (Arthur Young, *Nautical Dictionary*, 2nd ed., London. Spittswoode and Co., 1863). It would appear based on the evidence we heard, therefore, that the essence of a draft survey has changed little in over 150 years.

[155] That definition is consistent with the descriptions we heard of the work involved in performing a draft survey. To perform and to complete a draft survey, a marine surveyor must determine the displacement of the vessel when the hold or holds are empty. The marine surveyor must also, subsequently, determine the displacement of the same vessel once the hold or holds are loaded. The difference in the relative displacement corresponds, basically, to the weight of the cargo.

[156] We heard, at least in the case of most of the draft surveys performed by the MTSG in or around the Port of Vancouver, that the draft survey is usually performed prior to the start of the transportation of the goods to ascertain the weight of the cargo that has just been loaded onto the vessel. It follows, however, that a draft survey can also be used at the end of the transportation of the cargo to ascertain the weight of the cargo that has been unloaded. In laymen's terms, a draft survey seems to be a way, in effect, to weigh a vessel. Significantly, the interest in doing so is not, however, to ascertain the weight of the vessel itself but to ascertain the weight of the cargo that has been loaded (or unloaded) from the vessel.

[157] The Certispec website describes a draft survey as an independent certification of cargo weight loaded/discharged (from a vessel) based upon displacement surveys (of the vessel) taken before or after loading. The Board accepts that definition.

[158] The Board finds on the evidence that it is either the buyer or the seller of the commodity or cargo who hires Certispec to perform a draft survey. The evidence is clear that ship owners or operators do not hire marine surveyors at Certispec to perform this work. There is no evidence before us to suggest that a ship owner or operator requires a draft survey in order to operate a vessel in the international transportation of goods by sea.

[159] More critically, a draft survey is not performed simply for the sake of conducting a draft survey, it is performed to produce an end result. The end result of a completed draft survey is a

document called a certificate of weight. The evidence indicates, and the Board finds, that the certificate of weight is a document required by the buyer or seller of the commodity for billing purposes. Stated another way, there is no evidence before us to suggest that a certificate of weight is a document that a ship owner or operator requires in order to operate its vessel in the international transportation of goods by sea.

[160] Draft surveys represent about 25% of the MTSG workload.

c-Hold Inspections and Draft Surveys Go Hand in Hand

[161] To use the words of one of the witnesses, the Board finds that hold inspections commonly go "hand in hand" with draft surveys. Although the two tasks are separate and distinct, they are often performed in sequence as discrete parts of the overall work that Certispec performs for a given customer. Moreover, the evidence indicates that it is not uncommon for a customer to hire Certispec to perform work that includes sampling and inspection of cargo at the same time that the same customer hires Certispec to perform hold inspections and draft surveys related to that same cargo. Certispec then allocates the work among its divisions, as appropriate. While the hold inspection and the draft survey are performed by marine surveyors in the MTSG only, it is an employee from another Certispec division who will be involved at some point in inspecting or sampling the commodity that is destined to be loaded as cargo into the empty hold upon successful completion of a hold inspection.

[162] Significantly, given the threshold jurisdictional determination that the Board is required to make in this application, all of the evidence leads us to find that the inter-related work of hold inspections and draft surveys relate primarily to quantifying the amount of cargo and ensuring its quality. Hold inspections and draft surveys relate to the cargo; they do not relate to the operations of the ship or to the transportation of the goods.

[163] Yes, when performing a hold inspection, it is the hold of the ship itself that the marine surveyor is visually inspecting. However, the marine surveyor is doing so independently in order to ensure that the condition of the empty hold does not adversely affect the cargo to be loaded. We

heard no evidence that the hold inspection is being performed for the ship owner or operator to ascertain whether the condition of the hold is or is not consistent with continued operation of the ship at sea.

[164] Yes, when performing a draft survey, the marine surveyor is ascertaining the weight of the vessel prior to loading the cargo and comparing it to the weight of the vessel once the cargo is loaded. Again, although the marine surveyor is independently ascertaining the weight of the vessel at various times, that work is not related to the operation of the vessel and the transportation of goods. Rather, that draft survey is undertaken to provide an independent quantification of the weight of the cargo. It is not surprising, therefore, that the evidence indicates that Certispec marine surveyors perform these tasks for and at the request of the shipper or receiver of the cargo.

[165] Hold inspections and draft surveys are not performed by or at the request of the owner or operator of the vessel itself. Nor can they be. A large measure of the value that Certispec adds for its customer derives from its independence. It is unlikely that the parties to a purchase and sale of, for example, significant quantities of coal would see a vessel owner or operator as having the arms-length relationship to certify the cleanliness of its own vessel or to objectively quantify the weight of the cargo onboard. Independence is a critical part of Certispec's role. To perform its work and to add value for its customers, Certispec must operate independently of the parties for whom it works.

[166] The hold inspection results in Certispec issuing a certificate of cleanliness of the hold. The draft survey results in Certispec issuing a certificate of weight of the cargo. As employer witness Mr. Smith told us, these documents are used by the shipper or receiver of the goods for billing purposes. By billing purposes, the Board understands the billing to relate to the commercial transaction for the purchase or sale of the commodity that forms the cargo in the vessel. Stated another way, the ship owner or operator is not Certispec's customer. We heard no evidence that a ship owner or operator requests or requires any type of certificate from Certispec in order to transport the goods from a port in one country to a port in another country.

[167] The work of marine surveyors, at least in part, seems to be surprisingly similar to the work of cargo inspectors. The Board is struck by the parallel between the task of a marine surveyor, today, in the MTSG when conducting a hold inspection and the task of a cargo inspector, back in 1992, working at SGS when inspecting the hold of a ship. The CLRB remarked:

These inspectors, who are often referred to as cargo inspectors, spend most of their time on the waterfront. Their primary function is to inspect and verify the quality and quantity of bulk commodities prior to and during loading into the holds of vessels. **They also conduct inspections on conveyor systems and in the holds to ensure there is no contamination of the materials being shipped.**

(*SGS Supervision Services*; pages 130–131; emphasis added)

[168] The witnesses in this hearing all said that the purpose of a hold inspection was to ensure that the condition of the hold did not result in contamination of the cargo to be loaded. The Board has already found herein that hold inspections and draft surveys relate to the cargo and not to the operation of the ship. The Board is therefore struck by the parallel between our findings regarding the purpose of the inter-related tasks of hold inspections and draft surveys performed by the marine surveyors at issue today, and the findings of the CLRB regarding the tasks performed by the employees of SGS, other than marine surveyors, back in 1992:

Other than for an insignificant amount of work related to pre-loading inspections of containers for some shipping lines, about which the Board heard very little, SGS is not under contract to nor does it provide any services to ship owners, shipping agents, port authorities or any other such undertaking that is directly involved in shipping or navigation. The only connection that SGS has with shipping is that in British Columbia and the same is probably true in other coastal regions, many of its customers happen to be producers, purchasers or sellers of commodities that are bound for export by sea. *The transportation aspect of the commercial transactions between the purchaser and seller of these commodities is not, however, dependent upon the determination of the quantity or quality of the goods being shipped.* These services, which are performed by SGS as a neutral third party, are related more to the bona fides of the transaction vis-à-vis the quantity and quality of the goods being sold, rather than to how they are being transported.

(*SGS Supervision Services*; page 136; emphasis added)

[169] In other words, even though the decision of the previous Board in *SGS Supervision Services* did not deal with the work of marine surveyors, essentially all of the above findings of the previous Board are consistent with and can be applied by this Board to the marine surveyors now at issue

when performing hold inspections and draft surveys. That is critical since hold inspections and draft surveys together constitute well over half of their normal and habitual work. Of particular interest, as emphasized in the above quotation, is the finding of the CLRB that these tasks do not primarily relate to the transportation of goods by sea. This Board shares those views. As such, these two tasks are not essential to the operation of any core federal undertaking involved in navigation and shipping or the transportation of goods by sea.

d-Vetting Surveys

[170] The *Canadian Oxford Dictionary* defines the verb “to vet” as to “make a careful and critical examination of (a scheme, work, candidate, etc).” The same dictionary defines the noun “survey” as “a close inspection, investigation or examination” of something. In everyday language, to vet something is to look it over closely.

[171] For our purposes, a vetting survey and a SIRE inspection are interchangeable terms. The Board finds that a vetting survey performed by the MTSG is an inspection and examination of tug boats and barges, where those tug boats and barges are involved, or potentially involved, in the transportation of crude oil or petroleum products by sea. The inspection or examination is performed according to a checklist prescribed by OCIMF. The inspection or examination is performed by a marine surveyor who is qualified under the SIRE program of the OCIMF. The marine surveyors in the MTSG are all qualified SIRE inspectors.

[172] The evidence indicates that a SIRE inspector cannot be employed by or on behalf of a vessel owner or operator. A SIRE inspector must be independent of a vessel owner or operator. The SIRE inspection is performed by a qualified marine surveyor on behalf of a member of the OCIMF, and the information gathered during the inspection is retained on a database. OCIMF members use the information in the database to help them decide whether to hire a particular tug or barge as part of the movement of crude oil or petroleum products by sea. There is no evidence that a marine surveyor is retained by a ship owner or operator to perform a vetting survey. There is evidence that the OCIMF prohibits marine surveyors from performing a SIRE inspection for a ship owner or operator.

[173] Vetting surveys represent almost 25% of the MTSG workload.

e-Load Master

[174] The Board finds that a load master is a marine surveyor from the MTSG who is present on the vessel and, presumably, present in and around the terminal adjacent to the vessel, while a cargo of crude oil or petroleum products is being unloaded from that vessel. The load master is not performing the unloading of that specific commodity, nor is the load master operating any of the machinery or mechanisms involved in the unloading of that specific commodity. The load master is present to monitor the process of unloading that specific commodity. The evidence suggests, and that Board finds, that the load master is acting independently of the ship owner or operator. There is no evidence that the ship owner or operator is directing the marine surveyor in its task of load master. As we understand the evidence, a load master may also be present during loading as well, but that is not commonly the experience of the MTSG.

[175] Certispec does the work of load master at only one of approximately six similar terminals in the Port of Vancouver where crude oil or petroleum products are unloaded from vessels. Although load master work is almost 15% of the MTSG workload, Certispec currently performs all of its load master work on behalf of a single client. That client is not the ship owner or operator. That client is the operator of the terminal. There are at least four similar terminals in or around the Port of Vancouver who do not use and do not require a load master.

[176] The Board observes that the MTSG page of the Certispec website does not make any direct reference to load master work under that name. That said, the MTSG professional fee schedules both refer, at item 9.0, to "pre-loading/discharge safety and anti-pollution". Item 9.2 of the fee schedule is described as "monitoring shipboard operations throughout loading/discharge." The Board finds, therefore, that a load master at the MTSG is someone who is monitoring shipboard operations throughout the discharge of crude oil or petroleum products at one particular terminal to ensure that the discharge is performed safely and without causing undue or unwanted pollution.

[177] As the Board understands the evidence, the load master is present to monitor or oversee the unloading to minimize the possibility of accidents and pollution. The terminal operator hires Certispec to help to ensure that nothing happens during unloading of the cargo that will result in tortious or other liability for the terminal operator. It is, as the Board sees it, essentially a risk mitigation role. It is not, in our view, a role related to the operation of a ship or to the transportation of the commodity by sea.

[178] Load master work represents almost 15% of the MTSG workload. On this point, the Board accepts the documentary evidence at exhibit 5, tab 28.

f-Other MTSG Work

[179] The evidence indicates that the marine surveyors in the MTSG also perform other survey work such as on or off hire inspections (including bunker surveys), pre-purchase surveys and P and I insurance surveys. This other work represents less than 10% of the MTSG workload. Moreover, it is not necessarily frequent work. For example, in the period under review, a single marine surveyor performed a single pre-purchase survey of a vessel. The Board finds therefore that these other types of surveys do not constitute the normal and habitual activities of the marine surveyors in the MTSG.

B-Whether Vital, Integral or Essential

[180] The Board adopts the three-part analytical framework in *Northern Telecom*, 1980, to determine whether the marine surveyors in the proposed bargaining unit are or are not employed on or in connection with the operation of an existing core federal undertaking.

[181] The first step is to identify an existing core federal undertaking and its operations. The parties agree for the purpose of this application that the core federal undertaking has to come within the ambit of section 2(a) of the *Code*. The union defines the existing core federal undertaking somewhat broadly as "the operation of navigation and shipping" generally. The employer defines it more narrowly as "the operation of ships" engaged in the international transportation of goods by sea.

There is no dispute, and the Board finds, that the majority of the vessels operating in and out of the Port of Vancouver are engaged in the international transportation of goods by sea. The operation of those ships constitutes an existing core federal undertaking.

[182] As will be seen, however, the union has not identified a specific company or business operating a core federal undertaking, either within the broad category of "the operation of navigation and shipping" or within the narrower category of "the operation of ships." As stated in *Central Western Railway*, "there must exist a discrete and identifiable work or undertaking that is clearly within federal jurisdiction." In that decision, the Supreme Court of Canada rejected the notion that the core federal work or undertaking at issue could be defined as something as amorphous or general as the western grain transportation network. On the record of this application for certification, there is no evidence of a specific company that operates an existing core federal undertaking hiring or using the marine surveyors at Certispec to perform work. Certainly, there is no evidence that any of the customers who hired or used the marine surveyors in the MTSG at Certispec to perform hold inspections, draft surveys or vetting surveyors are themselves federal undertakings engaged in navigation and shipping (as will be explained below, there may be an exception in the case of the customer who hires the marine surveyors in the MTSG to perform load master work).

[183] The second step is to identify the work performed by the subsidiary operation. The parties also agree, for the purpose of this application, that the subsidiary operation is the work of the marine surveyors in the proposed bargaining unit. The nature of this work has been described in detail, above, at Part VII-A of these reasons for decision. There is no real dispute, and the Board finds, that the type of work that the three marine surveyors in the MTSG at Certispec normally and habitually perform as a going concern consists of hold inspections, draft surveys, vetting surveys and, to a lesser extent, load master work.

[184] The final step is to determine whether there is a sufficient nexus or link or dependency between the operation of the core federal undertaking and the work of the subsidiary operation. Again, there is no real dispute between the parties as to the legal test which the Board must apply, namely, whether the work performed by the three marine surveyors at issue is vital, essential or

integral to the operation of the core federal undertaking. The union argues that the test extends to and includes work that is reasonably incidental as well. As the Board understands it, the union therefore argues that the operation of the core federal undertaking does not have to be dependant upon the work of the marine surveyors.

[185] It is when we come to this final step involving the practical and functional or operational connection between the core and the subsidiary where the parties disagree. The parties differ as to whether a sufficient nexus or link exists between the operation of a core federal undertaking and the work of the subsidiary operation. The union sees the normal and habitual work of the marine surveyors as relating primarily to the ships themselves, and therefore part of the operation of navigation and shipping. The employer sees the work of the marine surveyors as related, first and foremost, to the cargo, including verification of the integrity, quantity and quality of that cargo. The employer sees this work as separate and distinct from the operation of ships engaged in the international transportation of goods by sea.

[186] To use the language of the *Stevedoring Reference*, for the work of the marine surveyors to be within federal jurisdiction, that work must be "part and parcel" of the operation of an identifiable core federal work, undertaking or business. To use the language of the *Northern Telecom* cases, the work of the marine surveyors must be " 'vital', 'essential' or 'integral' " to the operation of a core federal marine transportation undertaking. To use the language of the *Central Western Railway* case, the operation of the core federal marine transportation undertaking must, in turn, be dependent upon the work of the marine surveyors.

[187] That nexus and dependency can most easily be demonstrated through evidence of a contractual relationship between the core federal undertaking and the otherwise local undertaking especially where, pursuant to that contract, the federal undertaking directs the employees of the local undertaking in the manner they perform the vital or essential work.

[188] For example, in the *Stevedoring Reference*, Eastern Canada Stevedoring Company Limited (Eastern Canada Stevedoring) was an otherwise local undertaking under contract to seven specific shipping companies to load and unload their ships at a port during the shipping season. This work

represented 100% of their workload. The employees of Eastern Canada Stevedoring performed the work of stevedoring under the direction and authority of the ship's officers. The general category of federal work undertaking or business at issue was extra-provincial shipping pursuant to section 92(10)(a) of the *Constitution Act*, 1867; however, the specific federal entity could be readily identified as each of the seven shipping companies which had contracted with Eastern Canada Stevedoring. The court held that the employees of Eastern Canada Stevedoring were employed on or in connection with the operation of a core federal work or undertaking engaged in navigation and shipping.

[189] In the *Letter Carriers'* case, M & B Enterprises Ltd. (M & B) held a number of contracts with the Canada Post Office for the delivery and collection of mail by truck. This work represented 90% of their work. The employees of M & B were truck drivers who performed the work under the direction and control of Canada Post. The general category of federal work undertaking or business was the post office, pursuant to section 91(5) of the *Constitution Act*, 1867; however, the specific federal entity was readily identified as Canada Post. The court held that the employees of M&B were employed on or in connection with the operation of Canada Post.

[190] In the *Northern Telecom*, 1983 case, Northern Telecom Canada Limited (Northern Telecom) had a contractual relationship with Bell Canada for the installation of equipment into the telephone network of Bell Canada. This work represented 80% of their work on a continuing basis. In addition, Northern Telecom was a subsidiary of Bell Canada. Bell Canada's telephone network was held to be a core federal undertaking, pursuant to sections 92(10)(a) and 92(10)(c) of the *Constitution Act*, 1867. The specific federal entity was Bell Canada. The Court found those employees working as installers in the installation department at Northern Telecom were employed on or in connection with the operation of the federal undertaking of Bell Canada. As noted above, the Court made that finding with reluctance, and found that the fact situation was very close to the boundary between provincial and federal jurisdiction over labour relations.

[191] Conversely, in the *SGS Supervision Services* case, the CLRB found that there was insufficient evidence of operational integration or dependence between the work performed by samplers and cargo inspectors working at SGS and any core federal work or undertaking involved in navigation and shipping. Accordingly, the employees of SGS at issue (employees other than marine surveyors) were held not to be employed on or in connection with the operation of a core federal undertaking.

[192] For the reasons which follow, the Board finds that the sufficient nexus or connection at law between the normal and habitual work of the marine surveyors in the proposed bargaining unit and the operation of any existing core federal undertaking operated or carried on for or in connection with navigation and shipping does not exist.

[193] Hold inspections, draft surveys and vetting surveys are not, in our view, vital or essential or integral to the operation of any identified core federal undertaking within the scope of section 2(a) of the *Code*. This is so, in our view, whether that core federal undertaking is broadly defined as the operation of navigation and shipping generally, or more narrowly defined as the operation of ships engaged in the international transportation of goods by sea.

[194] The union, in argument, put considerable emphasis on the fact that the marine surveyors perform their normal and habitual work while onboard vessels engaged in the international transportation of goods by sea. The Board finds that the marine surveyors in the MTSG must be physically present on and around those international vessels at various times to perform their normal and habitual tasks of hold inspections, draft surveys, vetting surveys and load master work. In our view, that presence does not, however, establish a sufficient nexus or link to the operation of a core federal undertaking in a constitutional sense.

[195] The presence of marine surveyors onboard ships at various times does not, itself, establish a link, at law, to an identifiable federal work, undertaking or business. It also does not establish a link to the operator of a core federal undertaking. Although the applicant referred in argument to a link to a federal undertaking involved in navigation and shipping, the applicant did not identify the name

of any such particular company that hires or uses the marine surveyors at Certispec to perform their work. Although the marine surveyors are on board the vessel to perform their normal and habitual work, they are not on board the vessel to perform that work for the owner or the operator of the vessel.

[196] The union's task of bringing the work of the marine surveyors in the MTSG within the exception from provincial jurisdiction over labour relations would have been much simpler had the union identified a specific company that operates a core federal undertaking and then showed that that specific company had hired or used the marine surveyors in the MTSG to do work for it. The witnesses that the Board heard were all working, in various capacities, for Certispec. No witnesses were called from any other company. By extension, we heard no evidence from anyone employed by a core federal undertaking. No witness from a federal undertaking appeared to explain how the normal and habitual work of the marine surveyors at Certispec was a vital or essential part of the operation of their federal undertaking.

[197] The extensive documentary evidence on the record of this proceeding does not include any copies of any written contracts. The Board cannot, therefore, point to any evidence of a written contract between a core federal undertaking and Certispec involving the normal and habitual work of the marine surveyors in the MTSG.

[198] To the contrary, there is evidence that the marine surveyors in the MTSG perform most of their work for and at the request of the buyers or sellers or producers of the commodities that the marine surveyors are required to survey. The buyers and sellers and producers of the commodities may ultimately send those commodities to be transported by sea and may, indeed, enter into contracts of carriage with a federal transportation company. The buyers and sellers and producers of the subject commodities are not, at law, themselves federal undertakings. They are not employers subject to the *Code*.

[199] There is no evidence of dependency. The commodities at issue include vegetable oils, crude oil, petroleum products, sulphur, coal and potash. There is no doubt that, at various times, those commodities are transported as cargo by sea by international shipping companies. There is no doubt

that the employees of those federal transportation companies are themselves employed on or in connection with the operation of a federal work, undertaking or business and thereby subject to the *Code*. In certain cases, it may even be that the producers of some of those commodities may be dependent upon the international transportation by sea to be able to deliver those commodities to their final destination and to complete the contract of sale of the goods. That said, that is not the type of dependency, if any, which brings the buyers or sellers or producers of those commodities within federal jurisdiction. Given the threshold constitutional question before the Board in this application for certification, that dependency, if any, does not bring the normal and habitual work performed by the marine surveyors in the MTSG for the buyers or sellers or producers of those commodities within federal jurisdiction.

[200] There is no evidence of one dominant customer. The marine surveyors in the MTSG work for a number of customers. Unlike the leading cases at the Supreme Court of Canada, the marine surveyors at issue do not perform 100% or 90% or 80% of their normal and habitual work for one particular customer.

[201] There is also no evidence that the marine surveyors at issue perform their normal and habitual work under the direction and control of anyone. By extension, there is no evidence that they perform such work under the direction or control of anyone employed by a specific core federal undertaking. To the contrary, the marine surveyors in the MTSG perform their work independently. Much of the value they add through their work comes from their independence. The parties to a contract for the sale of commodities for export by sea hire the marine surveyors to perform a hold inspection and a draft survey independently because they benefit from the independent third-party assurance of the cleanliness of the hold and the weight of the cargo to be transported. The marine surveyors perform vetting surveys independently, albeit pursuant to a check list prescribed by the OCIMF. The marine surveyors perform load master work for one client at one terminal independently.

[202] The Board can find no evidence of any nexus or link between the normal and habitual activities of the marine surveyors in the MTSG and the operation of any identifiable core federal work, undertaking or business within the scope of section 2(a) of the *Code*. The Board finds no evidence that the activities of the MTSG, that is the work performed by the marine surveyors at

issue, is vital, essential or integral to the operation of a core federal undertaking operated in connection with navigation and shipping. The Board therefore finds that there is no evidence of dependency of the operation of a core federal transportation entity upon the normal and habitual work of the marine surveyors in the MTSG.

[203] The core of the union argument is that all of the work of the marine surveyors in the MTSG is work that is done on or about ships, and that the totality of that work is clearly connected with shipping. It also argues that the work focuses on the ship itself and not on the cargo. Commercial international shipping of bulk cargo is possible, according to the union, because of the totality of the services of the marine surveyors in the MTSG. The union says the subject work is integral to the core federal undertaking of shipping. It says that the marine surveyors performing that work are, therefore, employed on or in connection with the operation of navigation and shipping.

[204] The Board does not agree with that conclusion.

[205] The Board agrees that the work of the MTSG at Certispec is done on or about ships. The Board does not agree that the work is thereby integral to the operation of a core federal undertaking. As stated above, the union was not able to identify in evidence one Certispec customer who operates an existing core federal undertaking involved in the operation of navigation and shipping. The union could not, therefore, identify a core federal undertaking that directs the MTSG in how they perform their work. It may be that the work of the MTSG is fundamentally important to the "commercial international shipping of bulk cargo" as the union claims. That does not mean, however, that the "commercial international shipping of bulk cargo" is a core federal undertaking within the scope of section 4 of the *Code*. Somewhat like the western grain transportation network in the *Central Western Railway* case, there is no doubt that the "commercial international shipping of bulk cargo" is something that exists and can be identified; it is not, however, a core federal undertaking within the scope of sections 2(a) and 4 of the *Code* or for the purpose of the test set out in *Northern Telecom*, 1980.

[206] Most of the work that the marine surveyors do is performed for and at the request of the buyers or sellers or producers of the commodities that are transported, at least in part, as the cargo in the hold of a vessel. There is no evidence those customers operate federal works. That work may well be critical and important to those buyers and sellers; it is not however, thereby, work that is integral to the operation of a core federal undertaking involved in the transportation of that cargo. For example, this Board has jurisdiction under the *Code* over the labour relations of interprovincial trucking companies and interprovincial railway companies, other examples of core federal undertakings. The *Code* does not give us jurisdiction over the users or the customers of those core federal undertakings. Since the work performed by the MTSG is performed by and at the request of its customers, who are essentially all beyond federal jurisdiction, the Board cannot accept the argument that the totality of the work of the MTSG is integral to the operation of the core federal undertaking of shipping and navigation.

[207] The Board does not agree that all of the work of the MTSG focuses on the ship and not the cargo. The evidence does not support that assertion. The work does not focus on the operation of the ships themselves and does not relate to the operation of the federal undertakings engaged in the transportation of goods by sea. The work of hold inspections and draft surveys clearly focuses on the cargo itself.

[208] Hold inspections and draft surveys constitute well over half of the work of the MTSG. No doubt vetting surveys and load master work are important, but Certispec currently performs all of its vetting surveys for one customer and all of its load master work for another. Hold inspections and draft surveys are, so to speak, the bread and butter of marine surveying. As explained in Part VII-A-2-a above, a hold inspection is performed on the ship, but its entire purpose is to ensure the integrity of the cargo to be loaded into the hold. Similarly, the draft survey involves calculating the displacement of the vessel at various times, but its entire purpose is to ascertain the weight of the cargo. This is done for the shippers, who are the buyers or sellers or producers of the commodities. Those commodities are ultimately transported, in part, as cargos in the hold of a ship. The hold inspections and the draft surveys are done to assist the sellers, buyers and producers of the commodities in their commercial transactions for the sale and purchase of the commodities. This is not done for or at the request of the carriers by sea who operate the core federal undertakings. The

vessels themselves do not require a hold inspection or a draft survey to be performed by the marine surveyors in the MTSG in order to operate in the international transportation of goods by sea. Hold inspections and draft surveys are all about the cargo.

[209] We will look more closely at the types of work performed by the marine surveyors at issue.

1-Hold Inspections and Draft Surveys

[210] The evidence is clear, and the Board finds, that parties for whom the marine surveyors in the MTSG perform hold inspections and draft surveys are the buyers or sellers or producers of the commodities. Certispec does not perform that work under contract, whether oral or written, for ship owners or operators. The marine surveyors do not perform that work under the supervision or control of anyone; the marine surveyors perform that work independently. Indeed, as noted previously, it is the independent status of a marine surveyor that allows Certispec to add value for its customers. That independence is somewhat at odds with the notion of dependence of a core federal work or undertaking upon the hold inspections or draft surveys performed by the MTSG. Stated another way, the independent nature of marine surveyors suggests that they are not and cannot be part and parcel of the operation of a core federal work involved in the transportation of goods by sea. Hold inspections result in a certificate of cleanliness; draft surveys result in a certificate of weight. There is no evidence that either certificate is requested by a core federal undertaking or that either certificate is required by a core federal undertaking engaged in navigation and shipping for the operation of that undertaking.

2-Vetting Surveys

[211] The Board finds that marine surveyors in the MTSG perform vetting surveys (also known as SIRE inspections) for an oil company who is a member of the OCIMF. There is no evidence that the oil company or the OCIMF is a federal work or undertaking; there is no evidence before us that either the OCIMF or its members are an entity involved in the operation of vessels for the transportation of goods by sea. We heard that there is a contract between the oil company and Certispec to perform the vetting surveys, although the contract was not put onto the record of the

proceeding. In any event, there is no evidence that the oil company directs the marine surveyors in the manner they conduct the vetting surveys. There is no evidence that ship owners or operators direct the marine surveyors in how they conduct a vetting survey. Moreover, the documentary evidence clearly indicates, under the OCIMF constitution, that a marine surveyor conducting a SIRE inspection must remain independent from any ship owner or operator at all times. A vetting survey conducted by Certispec results in data about the characteristics of a specific tug or barge being uploaded to the OCIMF website. The evidence demonstrates that the work of a vetting survey is not performed at the request of a core federal undertaking. There is no evidence that the data produced by any vetting survey is required by the core federal undertaking engaged in navigation and shipping for the operation of that undertaking.

3—Load Master Work

[212] Load master work may be unique. The Board finds that load master work does not specifically relate to the loading or unloading of ships. The load master monitors the loading and unloading of the ship. The Board finds that the load master work does not generally relate to the operation of ships engaged in the international transportation of goods by sea. By extension, it is not work that is vital, essential or integral, in our view, to the operation of such ships. Load master work is performed for the operator of one particular terminal in the Port of Vancouver.

[213] We heard relatively little evidence about the terminal itself or about its operations. There is no suggestion that the terminal itself is a federal undertaking involved in the operation of ships engaged in the international transportation of goods by sea. The terminal is not, itself, an undertaking within the scope of section 92(10)(a) of the *Constitution Act*, 1867. It may possibly be that it is a core federal undertaking involved in the operation of navigation and shipping as more broadly defined, but the Board did not hear sufficient evidence to make such a finding. It is clear on the evidence that it is the specific terminal operator (and not the ships unloading at the terminal) that hires Certispec to perform the load master work. Even if we were to assume, without finding, that

the terminal where the load master work is performed is a core federal undertaking within the scope of section 2(a) of the *Code*, we do not find that the load master work is vital, essential or integral to the operation of such a terminal in the Port of Vancouver. It is not vital or essential work since most of the similar terminals within the same port continue to operate without a load master.

[214] The Board finds that the marine surveyors in the MTSG perform loading master work for one customer, a terminal operator in the Port of Vancouver. The marine surveyors in the MTSG do not, therefore, perform loading master work for the ship owner or operator. There is no evidence that Certispec, or the marine surveyors in its employ, are under contract from a ship owner or operator to perform loading master work. In fact, the evidence is to the contrary. By extension, there is no evidence that the marine surveyors at issue perform load master work under the direction and control of a ship owner or operator. Since a marine surveyor in the MTSG performs load master work at only one of approximately six similar terminals within the Port of Vancouver, there is no evidence that a load master is a required or compulsory component of the loading or unloading of crude oil or petroleum products at these terminals. The Board is aware that one witness said that he understands that a marine surveyor from another company performs load master work at another such terminal for a different customer.

[215] Since load masters are not used at the majority of the similar terminals within the Port of Vancouver for the loading or unloading of these specific commodities, there is no evidence that would allow the Board to find that an existing and specific federal entity is dependent upon the load master work. Moreover, since the load master work is not compulsory, it would be difficult to find that the work of the load master is vital, essential or integral to the operator of either the ship or the terminal. The Board finds that the marine surveyors at issue performing load master work are present on the ship and at the terminal to monitor the process of loading or unloading the cargo. They are present essentially in a risk mitigation role; they are not there to load or unload the cargo. They are present to monitor, or to oversee, the process of unloading a specific cargo on behalf of their client at Certispec. Although the marine surveyors performing the role of load master are present on and around the ship at all material times, the Board finds that they are not employed by a core federal entity and are not, therefore, employed on or in connection with the operation of a core federal transportation undertaking.

C--Previous Board Jurisdiction over Marine Surveyors

[216] Finally, of course, the union argues that this Board has exercised jurisdiction over marine surveyors for many years, and understandably relies upon a previous Board order in 1989 that certified another local of the same union as the bargaining agent for a unit of marine surveyors at SGS. Moreover, it seems the overall operations of SGS, at that time, were apparently similar to the overall operations of Certispec today. That 1989 order certified only that group of SGS employees working as marine surveyors. The Board refused a subsequent application to certify a unit of the other (non-marine surveyor) employees of SGS Supervision Services. It is true that this Board and its predecessor have exercised jurisdiction over the work of marine surveyors. This jurisdiction has included, among other things, certifying units of marine surveyors (such as orders nos. 5486 and 5488-U, both dated December 20, 1989) and revoking certification orders (such as order no. 8776-U dated January 11, 2005 and order no. 9224-U dated December 28, 2006). The 1989 certification order granted to ILWU Local 518 for a unit of employees at SGS employed as marine surveyors is still in effect: CLRB order no. 5487-U dated December 20, 1989. None of the parties directed us to any orders from provincial industrial relations boards certifying units of marine surveyors.

[217] The Board has carefully considered the circumstances behind those previous federal orders, as the Board is understandably reluctant to abandon a federal jurisdiction that has been exercised since at least 1989. Although federal jurisdiction over industrial relations is the exception to the general rule, it is nevertheless critical that this Board exercise that jurisdiction where it properly applies. Moreover, although relatively few employees working as marine surveyors appear to be subject to certification, a change in jurisdiction may result in some turbulence in their workplace.

[218] That said, there is no record of why the CLRB elected in 1989 to exercise jurisdiction over the work of marine surveyors. To the contrary, as noted in Part I of this Decision, in the *SGS Supervision Services*, the CLRB elected in their 1992 decision to question the scope of federal jurisdiction over that same work. It would therefore seem that our hearing was the first to benefit from extensive evidence of just what it is that a marine surveyor does on a day-to-day basis. Ours is also the first to expressly decline jurisdiction over the work of marine surveyors. It is on those

grounds that these reasons for decision are set out in a comprehensively fashion. The reasons may be too long and somewhat repetitive, but we wanted to err on the side of greater facts and more analysis to explain our decision.

[219] We heard that vetting surveys (SIRE inspections) were eventually created by the OCIMF as a response to the 1989 Exxon Valdez oil spill. It is therefore possible that vetting surveys did not yet exist and did not form any part of the work of the units of marine surveyors certified by the CLRB in 1989.

[220] We heard that load master work was created at one terminal at the suggestion of Certispec witness Mr. Smith. That suggestion came after 1989. It is therefore likely that load master work did not form any part of the work of the units of marine surveyors certified by the CLRB in 1989.

[221] It turns out, with the benefit of the evidence at the hearing, that the undertakings that use the marine surveyors in the MTSG have not been shown to be core federal undertakings engaged in the operation of navigation and shipping. That is the case involving hold inspections, draft surveys and vetting surveys. That is a marked and significant difference from the *Stevedoring Reference*, the *Letter Carriers'* case or either of the *Northern Telecom* cases where the core federal undertaking both hired the subsidiary undertaking and then supervised its work. By their very nature, marine surveyors are required to work independently.

[222] In short, with the benefit of the evidence we heard at an oral hearing, this panel of the Board has no hesitation in finding that the normal and habitual work of the marine surveyors in the MTSG is not vital or essential or integral to the operation of a core federal work involved in the operation of navigation and shipping. We also do not find it to be reasonably incidental, even if we were to assume that a nexus based on a reasonable incidental connection to the operation of any core federal undertaking is sufficient. The nexus or link between the work of the installers at Northern Telecom and the operation of Bell Canada's core federal undertaking was levels of magnitude greater than the nexus, if any, between the work of the marine surveyors in the MTSG and the operation of a core federal undertaking, if any, within the scope of section 2(a) of the *Code*. Recall, moreover, that the Supreme Court of Canada found the federal jurisdictional case over the work of the installers at

Northern Telecom to be “borderline.” There is really no possible interpretation of the constitutional facts of this case that would allow us to find that the members of the proposed bargaining unit at Certispec are employed on or in connection with the operation of a federal work, undertaking or business within the scope of sections 2(a) and 4 of the *Code*. We are compelled to dismiss the certification application for want of jurisdiction.

[223] In closing this section, the Board observes that the work of the marine surveyors in the MTSG is critical and important work that no doubt adds significant value to the customers who hire Certispec to have it performed. Those customers have not been shown to be, however, core federal undertakings involved in the operation of navigation and shipping. The Board also observes that the marine surveyors are well qualified and that Captain Rebello is a master mariner with many decades of valuable experience. The test of whether someone is or is not employed on or in connection with the operation of a federal work or undertaking is not a measure of the value or the importance of the work they perform. The Board, having regard to all of the relevant jurisprudence, does not find the normal and habitual work of the marine surveyors to be vital, essential or integral to the operation of a core federal undertaking; that finding does not mean that the work itself is not vital, essential or integral to the operation of other works or undertakings outside of federal jurisdiction.

[224] Most of the work that the marine surveyors perform is performed for and at the request of the buyers or sellers or producers of the commodities that are transported, at least in part, as the cargo in the hold of a vessel. That work may well be critical and important to those buyers and sellers; it is not however, thereby, work that is integral to the operation of a core federal undertaking involved in the transportation of that cargo by sea. The Board cannot accept the argument that the totality of the work of the MTSG is integral to the operation of any core federal undertaking of shipping and navigation.

VIII—Conclusion

[225] The Board dismisses the certification application for want of jurisdiction.

[226] The Board finds, and the parties essentially agree, that the normal and habitual work of the three marine surveyors in the proposed bargaining unit consists of performing hold inspections and draft surveys for a number of different clients, vetting surveys for an oil company and load master work at one particular terminal for the terminal operator.

[227] The Board finds, and the parties agree, that the appropriate legal test to apply is the test first elaborated in *Northern Telecom*, 1980 and consistently applied in subsequent jurisprudence, including *Central Western Railway* and *Consolidated Fastfrate*. The Board has to determine whether there is a sufficient nexus or connection between the normal and habitual work performed by the marine surveyors in the MTSG and the operation of an existing core federal work or undertaking involved in the operation of navigation and shipping; if that work is vital, essential or integral to the operation of any such core federal work, then the marine surveyors at issue will be held to be employed on or in connection with the operation of a core federal work or undertaking for the purpose of sections 2(a) and 4 of the *Code*. Otherwise, the marine surveyors at issue are employed by a local work and are within provincial jurisdiction.

[228] Hold inspections and draft surveys represent well over half of the workload of the marine surveyors at issue. These tasks go hand in hand and are often performed for the same customer. These tasks result in a certificate of cleanliness and a certificate of weight. Those certificates relate to the commercial transactions for the purchase and sale of the cargoes involved; those certificates are not used or required by the operators of any such core federal work. Vetting surveys, also called SIRE inspections, represent almost 25% of the workload of the marine surveyors at issue. This work is all performed for a single customer, an oil company.

[229] The three marine surveyors at issue constitute the MTSG, one of five divisions at Certispec. None of the customers who hire or uses the three marine surveyors in the MTSG to perform the work of hold inspections, draft surveys and vetting surveys are themselves federal works or undertakings involved in navigation and shipping nor do they operate any such core federal works or undertakings. The Board finds that there is no evidence of any company operating a core federal undertaking within the scope of section 2(a) of the *Code* hiring Certispec to perform any of this work.

[230] With the benefit of the evidence presented at the oral hearing, and even recognizing that this work is essentially all performed on or about ships involved in the international transportation of goods by sea, the Board has no hesitation in finding that the nexus or connection, if any, between the work of hold inspections, draft surveys and vetting surveys and the operation of any such core federal undertakings is clearly insufficient to bring the work within federal jurisdiction.

[231] None of the various indicia of the sufficient nexus or connection as found in the relevant jurisprudence exist: the work is not done for or at the request of any customer who operates such a core federal undertaking; the work is not done pursuant to a fixed term contract; the work is not all, or essentially all, performed for a single dominant customer; the work is not carried out subject to the supervision or control of the employees of any such core federal undertaking; the work is not work that the employees involved in the operation of any core federal undertaking could perform if the marine surveyors were not able to do so.

[232] The Board therefore finds that the work of hold inspections, draft surveys and vetting surveys is not vital or essential or integral to the operation of any core federal undertaking involved in the operation of navigation and shipping. We find that it is not reasonably incidental to any such operations.

[233] Load master work is somewhat different. It represents almost 15% of the work of the marine surveyors at issue. It is all performed for a single customer, a terminal operator, at a single terminal in the Port of Vancouver. That terminal operator may possibly be involved in the operation of a core federal work or undertaking related to navigation and shipping as defined at section 2(a) of the *Code*, but the evidence is not sufficient to allow the Board to make any such finding. The Board recognizes that load master work is performed during the unloading of a particular type of cargo from a ship, but the Board finds that it is not part and parcel of the unloading of the ship. It is a risk mitigation measure. The evidence is clear that the work is not vital or essential or integral to the operation of such a terminal generally, since a number of other similar terminals within the same port operate without a load master. The Board therefore finds that the load master work is not essential for the purpose of the *Northern Telecom*, 1980 test.

[234] Even if we had found the load master work to be vital or essential in that sense, it represents such a small percentage of the overall workload of the marine surveyors in the MTSG at Certispec that this work alone would be insufficient to bring them within federal jurisdiction. Load master work alone does not bring the marine surveyors at issue within the exception from provincial jurisdiction over labour relations.

[235] Having regard to all of the above, the Board finds that the employees in the proposed bargaining unit are not employed on or in connection with the operation of any federal work, undertaking or business within the scope of sections 2(a) and 4 of the *Code*.

[236] For all of the reasons outlined above, the application for certification is dismissed.

William G. McMurray
Vice-Chairperson

John Bowman
Member

André Lecavalier
Member